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Recent Developments in Montana Law

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RECENT DEVELOPMENTS

RECENT DEVELOPMENTS IN MONTANA LAW

Timothy S. Hamill

Cynthia K. Staley*

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I. INTRODUCTION

This Recent Developments Article consists of brief synopses of selected noteworthy cases decided recently by the Montana Supreme Court. Each Development is self-contained. With this Article, the Montana Law Review revives a tradition of bringing to practitioners' attention several cases of practical significance. The Montana Law Review does not represent that it surveyed all areas of Montana law.

II. CIVIL PROCEDURE

Bache v. Gilden: Motion for Continuance Unnecessary to Preserve Appeal of Surprise or Prejudicial Evidence

The Montana Supreme Court's decision in *Bache v. Gilden*¹ affirms the court's continued disapproval of "Perry Mason" style surprise tactics during litigation. In *Bache* the Montana Supreme Court, in overruling a line of precedent,² held that failure to request a continuance at trial when presented with surprise or prejudicial evidence is no longer a waiver of the right to claim error on appeal.³ The court's decision adds additional incentive for attorneys to comply with pretrial procedures, since the court will not allow violations to prejudice the opposing party.

Bache arises from a personal injury action in which the plaintiff was injured in a motor vehicle accident and sued to recover

1. 252 Mont. 178, 827 P.2d 817 (1992).

2. See *Barrett v. Asarco, Inc.*, 234 Mont. 229, 234-36, 763 P.2d 27, 30-31 (1988) (relying on *Sikorski v. Olin* to hold that plaintiff's failure to request a continuance prevented plaintiff from claiming prejudice when the district court excluded defendant's offered evidence after a late disclosure of witnesses who would testify as to plaintiff's alleged employee misconduct); *Sikorski v. Olin*, 174 Mont. 107, 111, 568 P.2d 571, 573 (1977) (stating that defendants' failure to request a continuance on the ground of surprise or undue advantage when the court allowed plaintiff to amend an answer to his interrogatories on the day of trial constituted a waiver by defendants of any right to claim error on appeal).

3. *Bache*, 252 Mont. at 182, 827 P.2d at 819.

damages.⁴ During trial, the defendant introduced a survey of the accident scene into evidence through witness Goacher. The plaintiff objected, claiming surprise and prejudice. In support of his objection, the plaintiff stated that the defendant failed to list Goacher in the pretrial order and failed to identify Goacher until shortly before trial.⁵ Claiming the survey was not "a reasonable resemblance of the condition of the road at the time of the accident," the plaintiff had a vested interest in keeping the exhibit out of evidence.⁶

When the district court overruled the plaintiff's objection, the plaintiff did not request a continuance. On appeal, the supreme court stated that the district court abused its discretion and committed reversible error when it allowed Goacher's testimony. The court held that the plaintiff did not need to request a continuance to preserve this objection for appeal, since the defendant's "tactics [were] contrary to the letter and spirit of all pretrial discovery."⁷

The defendant failed to identify Goacher or the survey in his responses to the plaintiff's discovery requests that the defendant name any witnesses he intended to call at trial and identify any exhibits he intended to introduce. The defendant indicated that he would supplement his discovery responses prior to trial.⁸ Additionally, in accordance with the district court's scheduling order, the parties were to exchange lists of witnesses and exhibits and complete discovery by certain scheduled dates. Despite the court-ordered deadline, the defendant did not provide the plaintiff with a list of his witnesses until a week after the scheduling order deadline had passed. The defendant sent his list of witnesses by fax but did not identify Goacher or provide a copy of the survey of the accident scene. At that time, the defendant listed another witness who was to provide foundation for the survey. The plaintiff finally received a copy of the survey one week before trial.⁹ Moreover, the defendant failed to mention Goacher at the final pretrial conference or list him in the pretrial order. The pretrial order stated that the plaintiff was to depose the witness the defendant identified to provide the necessary foundation for the survey. The plaintiff then learned one week before trial that Goacher, rather than the listed witness, had prepared the survey. The plaintiff was unable to de-

4. *Id.* at 179-80, 827 P.2d at 818.

5. *Id.*

6. *Id.* at 181, 827 P.2d 819.

7. *Id.* at 182, 827 P.2d at 819 (quoting *Krueger v. General Motors Corp.*, 240 Mont. 266, 273, 783 P.2d 1340, 1344-45 (1989)).

8. *Id.* at 180-81, 827 P.2d at 818.

9. *Id.* at 181, 827 P.2d at 818-19.

pose Goacher prior to trial.¹⁰

The defendant contended these omissions did not preclude him from calling Goacher to introduce the survey at trial, since he had "reserved the right to call additional witnesses as necessary for foundation" when he initially provided the plaintiff with his list of witnesses in response to the scheduling order. In rejecting the defendant's argument, the supreme court did not allow this vague, unilateral reservation to satisfy the requirements of pretrial disclosure.¹¹

The court reiterated its holding in *Workman v. McIntyre Construction Co.* where it found that the tactics employed by the defendant were "contrary to the letter and spirit of all pretrial discovery which is to *prevent surprise*, to simplify the issues, and to permit counsel to prepare their case for trial on the basis of the pretrial order."¹² This policy works to the advantage of all parties in preparing their cases for trial.

The 1983 Amendments to the Federal Rules of Civil Procedure, which formed the pattern for the Montana Rules of Civil Procedure, were designed to "enhance the planning and management of litigation" in an effort to assist the parties in preparing for trial and to eliminate surprise during trial.¹³ The amendments liberalized discovery and the pretrial process in order to formulate the issues, eliminate remaining frivolous claims and defenses, and avoid uncontroverted issues and surprise that could delay the trial.¹⁴ Inherent in this argument is a sense that during all stages of litigation, the litigants should be searching for justice rather than playing games with evidence.

Despite the holding in *Bache*, parties should still consider requesting a continuance when faced with surprise evidence. While the request for a continuance is no longer necessary after *Bache* to preserve for appeal a claim of surprise, the Montana Supreme Court may not find the party was prejudiced by the surprise evidence.¹⁵ Rather, the court may find that the opposing party made

10. *Id.* at 181, 827 P.2d at 819.

11. *Id.* at 181-82, 827 P.2d at 819.

12. 190 Mont. 5, 12, 617 P.2d 1281, 1285 (1985) (emphasis added) (holding that admission of a film segment was an abuse of the lower court's discretion since the movie was not listed as an exhibit in the pretrial order and the movie was not available for pretrial examination to determine its relevancy or comparability to the facts and circumstances involved in the case).

13. 3 JAMES W. MOORE & RICHARD D. FREER, *MOORE'S FEDERAL PRACTICE* ¶16.10-11 (2d ed. 1993).

14. *See id.* ¶ 16.11.

15. The defendant in *Bache* offered no justification or excuse for his lack of disclosure. Moreover, the court has suggested that efforts to make disclosure as quickly as possible <https://scholarworks.umt.edu/mlr/vol54/iss2/10>

sufficient efforts to reveal the surprise evidence to counsel before trial or had no way of discovering the evidence until its introduction at trial. Consequently, the continuance, if granted by the district court, may remain a party's best opportunity to prepare for surprise evidence.

III. COMMERCIAL LAW

Martin v. Dorn Equipment Co.: Montana Applies "Breach of the Peace" in U.C.C. Repossession Actions

In *Martin v. Dorn Equipment Co.*¹⁶ the Montana Supreme Court recognized that the creditors' right to self-help repossession under the Uniform Commercial Code (U.C.C.) was abrogated by the creditors' breach of the peace in effecting that repossession. In *Martin* the court found that the creditors' act of cutting a locked chain on a gate while effecting self-help repossession of equipment on the debtors' ranch constituted a breach of the peace.¹⁷ Although the court's holding is consistent with that of other jurisdictions,¹⁸ many issues with respect to breach of the peace are left for future resolution.

In *Martin* the creditors financed the sale of various farm equipment to the debtors. When the debtors failed to make payments required by the terms of the security agreements, the creditors went to the debtors' ranch to repossess equipment but found "the gate to the ranch . . . secured by a chain and padlock." Nonetheless, the creditors cut the chain, proceeded onto the debtors' property, and were confronted by the hired hand—whom the creditors informed of their intent to repossess the equipment.¹⁹

after the party learns of new evidence and efforts to make the witness or exhibit available may preclude the court from automatically finding reversible error. *See Workman*, 190 Mont. at 12, 617 P.2d at 1285 (citing defendant's failure to offer any justification or excuse for failing to disclose exhibit until just prior to showing it to the jury). *Cf. Barrett*, 234 Mont. at 234-35, 763 P.2d at 30 (noting that defendant "gave notice of the new witnesses and the content of their testimony nearly a month before trial. . . . [and] also offered to promptly have the new witnesses deposed at its expense"). *But see* *Glacier Nat'l Bank v. Challinor*, 253 Mont. 412, 417, 833 P.2d 1046, 1049 (1992) (reiterating that the court's prior holding in *Sikorski* has been overruled by *Bache* and negating any future reliance thereon for the proposition that failure to request a continuance at trial waives the objecting party's right to rely on the objection of surprise on appeal).

16. 250 Mont. 422, 821 P.2d 1025 (1991).

17. *Id.* at 42, 821 P.2d at 1028.

18. *See* *Laurel Coal Co. v. Walter E. Heller & Co.*, 539 F. Supp. 1006, 1007-08 (W.D. Pa. 1982). *But see* *Global Casting Indus., Inc. v. Daley-Hodkin Corp.*, 432 N.Y.S.2d 453, 456 (N.Y. Sup. Ct. 1980) (defendant's employee "entered the plaintiff's premises by use of a key unauthorizedly obtained. Such an entry, even if the chains were cut . . . does not, as a matter of law, constitute a breach of the peace.").

19. *Martin*, 250 Mont. at 424-25, 821 P.2d at 1026-27.

The district court granted summary judgment in favor of the creditors concluding as a matter of law that the creditors did not breach the peace in effecting repossession of the debtors' equipment.²⁰ On appeal, the Montana Supreme Court noted that both the security agreements and section 30-9-503 of the Montana Code authorized the creditors to repossess the debtors' equipment without resort to judicial process.²¹ Section 30-9-503, however, limits the creditors' authority to instances in which self-help repossession can be effected without breaching the peace.²² Beyond cutting the chain and confronting the hired hand, the court made no suggestion that the repossession resulted in violence or presented a potentially violent situation.²³

To determine whether the creditors' conduct constituted a breach of the peace under section 30-9-503, the court cited the general rule that "the creditor cannot utilize force or threats, cannot enter the debtor's residence without consent, and cannot seize any property over the debtor's objections."²⁴ The court then turned to a factually analogous case, *Laurel Coal Co. v. Walter E. Heller & Co.*²⁵ The court in *Laurel Coal* found "that any form of forcible entry constitutes breach of the peace."²⁶ Relying on *Laurel Coal*, the court in *Martin* similarly concluded that by cutting the locked chain without the debtors' consent, the creditors forcibly entered the debtors' property, thereby breaching the peace.²⁷ As a result, the supreme court reversed the lower court's grant of summary judgment in the creditors' favor, holding instead that the creditors breached the peace,²⁸ making their repossession unlawful.

Generally, self-help repossession existed at common law before adoption of the U.C.C.²⁹ Section 9-503 of the U.C.C. authorizes self-help repossession if it can be done without breach of the

20. *Id.* at 426, 821 P.2d at 1027.

21. *Id.*

22. MONT. CODE ANN. § 30-9-503 (1991). See *Salisbury Livestock Co. v. Colorado Credit Union*, 793 P.2d 470, 473 (Wyo. 1990) (describing self-help repossession as a "conditional self-help privilege" (emphasis added)).

23. *Martin*, 250 Mont. at 425, 821 P.2d at 1026-27.

24. *Id.* at 427, 821 P.2d at 1028 (quoting JONATHAN SHELDON & ROBERT A. SABLE, REPOSSESSIONS § 6.3 (1988)).

25. 539 F. Supp. 1006 (finding breach of the peace where creditor cut a chain to access debtor's commercial property for the purpose of repossessing a bulldozer).

26. *Id.* at 1007-08 (identifying the policy bases for the court's ruling as "the protection of real property interests and the law's aversion to trespass").

27. *Martin*, 250 Mont. at 427, 821 P.2d at 1028.

28. *Id.* at 428, 821 P.2d at 1028.

29. See generally *Connecticut v. Indrisano*, 613 A.2d 1375, 1378 (Conn. App. Ct. 1992) (citing James R. McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. CAL. L. REV. 58, 72-75 (1973)).

peace; otherwise creditors must resort to judicial remedies.³⁰ By providing self-help repossession, the U.C.C. balances the creditors' interests in efficient repossession and "reduced costs of credit for debtors" on one side against society's "need to avoid possibly violent confrontations between debtors and creditors" and "private property interests" on the other.³¹ Consequently, if abused, self-help repossession "invades the legitimate conflict resolution function of the courts."³²

Since breach of the peace is not defined in either the U.C.C. or the Montana Code, a definition is left to Montana courts. As the law review cited by the court in *Laurel Coal* notes, definitions of breach of the peace are based on a variety of interests: society's interest in prohibiting the use, threat of use, or potential use of force or violence (often prohibited by criminal law sanctions); real property interests; personal property interests; and the debtors' objections to repossession.³³ White and Summers suggest that the majority of courts focus on: (1) the premises upon which creditors effect entry and (2) debtors' consent to the repossession.³⁴ The Montana Supreme Court did not, however, expressly adopt this approach in *Martin*.

30. Montana adopted section 9-503 of the U.C.C. in its entirety in 1963:

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under 30-9-504.

MONT. CODE ANN. § 30-9-503 (1991).

31. See *Riley State Bank v. Spillman*, 750 P.2d 1024, 1029 (Kan. 1988); *General Elec. Credit Corp. v. Timbrook*, 291 S.E.2d 383, 385 (W. Va. 1982); *Salisbury Livestock*, 793 P.2d at 473.

32. See *Salisbury Livestock*, 793 P.2d at 473 (quoting Sam O. Simmerman & John Variola, Case Comment, *Ford Motor Credit Co. v. Byrd: Is Repossession Accomplished by the Use of Stealth, Trickery, or Fraud a Breach of the Peace Under Uniform Commercial Code Section 9-503?*, 40 OHIO ST. L.J. 501, 504 (1979)); *Kimble v. Universal TV Rental, Inc.*, 417 N.E.2d 597, 601 (Ohio Mun. Ct. 1980) (finding creditor liable for trespass, conversion, compensatory and punitive damages, and attorney fees after repossessing television from debtor's locked apartment).

33. Eugene Mikolajczyk, Comment, *Breach of Peace and Section 9-503 of the Uniform Commercial Code—A Modern Definition for an Ancient Restriction*, 82 DICK. L. REV. 351, 354-72 (1978).

34. 2 JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 27-6 (3d ed. 1988) ("In most cases, to determine if a breach of the peace has occurred, courts inquire mainly into: (1) whether there was entry by the creditor upon the debtor's premises; and (2) whether the debtor or one acting on his behalf consented to the entry and repossession."). See, e.g., *Wade v. Ford Motor Credit Co.*, 668 P.2d 183, 186 (Kan. Ct. App. 1983); *Bloomquist v. First Nat'l Bank*, 378 N.W.2d 81, 84 (Minn. Ct. App. 1985).

Many breach of the peace issues are left for future resolution. For example, other courts categorize the type of premises upon which the creditor effects entry as residential, commercial, or that of a third-party.³⁵ Privacy expectations, time and manner of entry, property status, and rural versus urban setting also are taken into account.³⁶ Courts have generally found that common law trespass alone does not constitute breach of the peace.³⁷ In fact, one court has noted that the U.C.C. implies "a limited privilege to enter."³⁸

Furthermore, whether the debtor protests the repossession causes difficulty. Some courts have held that if the debtor protests, the creditor must seek judicial relief to avoid overriding any valid defenses the debtor might have.³⁹ White and Summers discuss "the [unclear] effect of a clause in the security agreement purporting to authorize non-judicial repossession"⁴⁰ and state that avoiding breach of the peace "answers not only to the needs of the debtor, but also to those of his wife and children, and to the public policy against fistfights and shoot-outs. Such a rule should not be varied merely because of a prior agreement between a creditor and a debtor."⁴¹ White and Summers further argue:

It is consistent with the underlying policy to find on the one hand, that a consent given contemporaneously with the repossession is effective and, on the other hand, that one given weeks or months before in a clause in the security agreement is ineffective. In the former case, the debtor fully appreciates the consequences of his consent and has no time in which to change his mind. That is not so in the latter case. For these reasons, the contemporaneous consent affords substantial protection against violence, while an earlier written consent does not. Since the goal of the breach of the peace doctrine is to prevent violence, not to protect contract expectations, the distinction is appropriate.⁴²

In *Martin* the Montana Supreme Court recognized that the creditors breached the peace while effecting self-help repossession. The creditors' forcible entry onto the debtors' property constituted the breach of the peace. As self-help repossession continues, other

35. See Mikolajczyk, *supra* note 33, at 358-62.

36. See, e.g., *Salisbury Livestock*, 793 P.2d at 474-75.

37. See *Nebraska v. Trackwell*, 458 N.W.2d 181, 184 (Neb. 1990).

38. *Marine Midland Bank-Central v. Cote*, 351 So. 2d 750, 752 (Fla. Dist. Ct. App. 1977).

39. See *Hopkins v. First Union Bank*, 387 S.E.2d 144, 146 (Ga. Ct. App. 1989) (noting defaulting debtor's "unequivocal oral protest"); *First & Farmers Bank of Somerset, Inc. v. Henderson*, 763 S.W.2d 137, 140 (Ky. Ct. App. 1988); *Bloomquist*, 378 N.W.2d at 84.

40. 2 WHITE & SUMMERS, *supra* note 34, at 579.

41. 2 *id.* at 580.

42. 2 *id.* at 580 n.33.

factual situations will present additional issues for resolution by Montana courts.

IV. CONSTITUTIONAL LAW

Great Falls Tribune Co. v. Great Falls Public Schools and Associated Press v. Board of Public Education: Statutory Collective Bargaining and Litigation Exceptions to Right-to-Know Provision Clause Found Unconstitutional

In 1972 the people of Montana ratified the Montana Constitution—a constitution unique among all other states in that it contains a right-to-know clause⁴³ recognizing the public's interest in open government. The right-to-know clause prohibits state agencies from closing meetings to members of the public, including members of the press, unless individual privacy exceeds the merits of public disclosure.⁴⁴ *Great Falls Tribune Co. v. Great Falls Public Schools* and *Associated Press v. Board of Public Education*, two cases of first impression, demonstrate the strength of the Montana Supreme Court's commitment to prohibiting statutory limitations on the public's constitutional right to know.⁴⁵ Admittedly, by broadening the public's constitutional right to access state government, public agencies' ability to function in an economically efficient manner may be impacted.⁴⁶

In 1977 the Montana Legislature amended the then-existing Montana open meeting statute⁴⁷ to add collective bargaining and litigation exceptions to the constitutional right-to-know provision.⁴⁸ The statutory exceptions allowed a public agency to close a

43. MONT. CONST. art. II, § 9 (titled "Right to know"): "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

44. MONT. CONST. art. II, § 9. See *State ex rel. Great Falls Tribune Co. v. District Court*, 238 Mont. 310, 317, 777 P.2d 345, 349 (1989) ("[t]he press also enjoys this right . . . because of its surrogate role for the public").

45. *Great Falls Tribune Co. v. Great Falls-Pub. Schools*, 255 Mont. 125, 131, 841 P.2d 502, 505 (1992) (holding that public school board may close its collective bargaining strategy meetings only when the need for individual privacy exceeds the merits of public disclosure); *Associated Press v. Board of Pub. Educ.*, 246 Mont. 386, 392, 804 P.2d 376, 379 (1991) (holding that absent a demand of individual privacy exceeding the merits of disclosure, Montana citizens have a constitutional right to attend meetings of a public agency held to discuss potential litigation strategy against another state governmental entity).

46. Bob Anez, *Court Wants Labor Talks Out in Open*, MISSOULIAN, Nov. 13, 1992, at B2; *Unions Don't See It as Much of a Victory*, MISSOULIAN, Nov. 13, 1992, at B2.

47. 1977 Mont. Laws 567.

48. MONT. REV. CODE § 82-3402 (1947) (current version at MONT. CODE ANN. § 2-3-203 (1991)) (titled "Meetings of public agencies and certain associations of public agencies to be open to public—exceptions"):

meeting to discuss strategy regarding collective bargaining or litigation.⁴⁹ In 1978 Montana Attorney General Mike Greely anticipated the issue presented by *Associated Press* and *Great Falls Tribune* when he stated: "The open-meeting statute purports to go beyond the interests of individual privacy" as provided in Article II, section 9.⁵⁰ Recognizing that he, as attorney general, had no authority to question the constitutionality of section 2-3-203(4) of the Montana Code, Attorney General Greely noted: "[T]he mere presence of discussions relating to collective bargaining or litigation strategy *without more* is insufficient to allow a meeting to be closed under Article II, section 9."⁵¹

Despite Attorney General Greely's opinion, subsequent Montana Legislatures did not resolve the conflict between Article II, section 9 and section 2-3-203(4). In fact, two subsequent legislatures amended the open meeting statute without addressing this conflict.⁵² The public, likewise, has not amended the right-to-know clause, despite its ability to do so.⁵³ Consequently, until the court's decisions in *Associated Press* and *Great Falls Tribune*, the conflict remained between the constitutional and statutory right-to-know provisions.

In 1989 the Board of Public Education (Board) conducted a telephone conference call meeting of its members and its attorney to discuss potential litigation strategy challenging Executive Order 04-89.⁵⁴ The Board voted to close the meeting to discuss its strat-

(1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds must be open to the public.

....
 (4) However, a meeting may be closed to discuss a strategy to be followed with respect to collective bargaining or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public agency.

49. MONT. CODE ANN. § 2-3-203(4) (1991).

50. 37 Op. Att'y Gen. 716, 719 (1978).

51. *Id.*

52. See 1987 Mont. Laws 183; 1979 Mont. Laws 380.

53. See MONT. CONST. art. XIV, §§ 8 and 9 (providing for amendment by legislative referendum and constitutional initiatives). Although arguably seldom exercised, the public has the right either to provide for additional constitutional exceptions to the right-to-know provision or to delegate legislative authority to enact additional statutory exceptions. If the citizens were to amend Montana's constitutional right-to-know provision either by providing additional constitutional exceptions or by delegating authority to the legislature to enact statutory exceptions, the provision would then be similar to that of other states. See Brief of Plaintiffs and Respondents at Appendix B, *Associated Press* (No. 89-589) (citing provisions of the Louisiana, New Hampshire, and North Dakota constitutional right-to-know provisions).

54. *Associated Press*, 246 Mont. at 388-89, 804 P.2d at 377-78. The Governor's Exec-

egy and, despite an Associated Press reporter's objection, excluded the reporter and two other non-Board members from the meeting. When the meeting reopened, the Board allowed the excluded individuals to re-enter and then unanimously passed a motion calling for a court challenge to the Governor's executive order. Thereafter, Associated Press, its member news organizations, the Montana Newspaper Association, and the Montana Chapter of the Society of Professional Journalists filed suit against the Board challenging the constitutionality of section 2-3-203(4).⁵⁵

In 1990 Great Falls Public Schools, Board of Trustees (Trustees) conducted negotiations with a bargaining unit of teachers' aides and library aides. Following receipt of a written report of a fact-finder engaged by the Trustees to conduct a hearing and make recommendations regarding the negotiations, the Trustees announced that a closed meeting would be held to discuss the fact-finder's report. The Great Falls Tribune requested the meeting be open, and the Trustees complied. The meeting, however, contained no deliberation of the fact-finder's report. Rather, the Trustees voted to reject the report without discussion. The Great Falls Tribune filed suit against the Trustees alleging that the Trustees discussed the matter privately prior to the open meeting at which the vote was taken.⁵⁶

As a result of *Associated Press* and *Great Falls Tribune*, the Montana Supreme Court found unconstitutional both the litigation exception and the collective bargaining exception found in section 2-3-203(4).⁵⁷ In *Associated Press* the court addressed a narrow issue: "[W]hether the citizens of the [s]tate of Montana have an absolute constitutional right to attend and observe a meeting held by a public body or state agency which is held to discuss litigation strategy to be used in potential litigation against another state governmental entity."⁵⁸ The court held that absent a demand of individual privacy that exceeds the merits of disclosure, Montana citizens have a constitutional right to attend meetings of public agencies held to discuss potential litigation strategy against another state governmental entity.⁵⁹ The court's decision will impact

tive Order 04-89 "required that the Board's administrative rules be submitted to the Governor for review and approval." *Id.* at 388, 804 P.2d at 377.

55. *Id.* at 389, 804 P.2d at 377-78.

56. *Great Falls Tribune*, 255 Mont. at 127, 841 P.2d at 503.

57. *Id.* at 131, 841 P.2d at 505 (holding collective bargaining exception unconstitutional); *Associated Press*, 246 Mont. at 392, 804 P.2d at 379 (holding litigation exception unconstitutional).

58. *Associated Press*, 246 Mont. at 389, 804 P.2d at 378.

59. *Id.* at 392, 804 P.2d at 379.

significantly the relationship between state agencies and their attorneys.

The issue the court addressed in *Great Falls Tribune*, however, may have an equally far-reaching effect: "[W]hether Article II, [s]ection 9, require[d] a balancing of the right to know with other constitutional provisions and policy considerations or whether individual privacy is the only matter against which the right to know should be balanced."⁶⁰ The court held that absent a demand of individual privacy exceeding the merits of disclosure, Montana citizens have a constitutional right to attend collective bargaining strategy discussions of public agencies.⁶¹

Several well-established Montana rules of constitutional interpretation are significant to the court's discussion of the right-to-know clause and section 2-3-203. When the constitution addresses a specific subject, the constitutional declarations prevent the legislature from enacting statutes extinguishing or limiting the powers conferred by the constitution.⁶² Consequently, the court could not ignore the right-to-know clause in applying section 2-3-203(4) to the facts presented by *Associated Press* and *Great Falls Tribune*.

Additionally, Montana case law establishes that rules of statutory interpretation also apply to constitutional interpretation.⁶³ Thus, Montana statutory law and case law provide that courts may not expand the statutes or constitutional provisions by inserting what has been omitted or omitting what has been inserted.⁶⁴ Courts must first look to the plain meaning of the language used.⁶⁵ No other means of construction are permitted if the language of the statute is clear.⁶⁶

The Montana Supreme Court has previously determined that the language of Article II, section 9 is unambiguous and provides only one exception to the public's right to know.⁶⁷ However, the Board argued in *Associated Press* that the meaning of the terms

60. *Great Falls Tribune*, 255 Mont. at 129, 841 P.2d at 504.

61. *Id.* at 131, 841 P.2d at 505.

62. *Noll v. City of Bozeman*, 166 Mont. 504, 507, 534 P.2d 880, 881 (1975) (citing *State ex rel. Pierce v. Gowdy*, 62 Mont. 119, 126, 203 P. 1115, 1116 (1922); *State ex rel. DuFresne v. Leslie*, 100 Mont. 449, 454, 50 P.2d 959, 962 (1935); and *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 76, 195 P. 841, 844 (1921)).

63. *Great Falls Tribune*, 255 Mont. at 128-29, 841 P.2d at 504 (citing *Keller v. Smith*, 170 Mont. 399, 404, 553 P.2d 1002, 1006 (1976)).

64. MONT. CODE ANN. § 1-2-101 (1991); *In re Adoption of Smigaj*, 171 Mont. 537, 540, 560 P.2d 141, 143 (1977).

65. *Smigaj*, 171 Mont. at 540, 560 P.2d at 143.

66. *Id.*

67. *Great Falls Tribune v. District Court*, 186 Mont. 433, 437-38, 608 P.2d 116, 119 (1980).

"deliberations," "meeting," and "documents" in Article II, section 9 were potentially ambiguous as applied to the facts of *Associated Press*, and thus required the court to resort to other methods of interpretation to decide the issue presented.⁶⁸ The supreme court did not find the Board's argument persuasive under the factual situation presented by *Associated Press*.⁶⁹ Because the supreme court found no ambiguity existed, the court found it unnecessary to consider additional common law of Montana or other states, the history of Montana statutory open meeting laws, the intent of the delegates to the 1972 Montana Constitutional Convention, or what other states have recognized as additional public policy exceptions to the public's right to know.⁷⁰ Regarding the constitutionality of section 2-3-203(4), the court in *Associated Press* concluded by stating in dicta that the dispute presented by the factual situation at hand was the very essence of "the public's business."⁷¹ This statement implies that the court may be receptive to future public policy arguments for narrowing what currently appears to be liberal protection of the public's interest in open government.

Since ratification of the constitutional right-to-know clause, the Montana Supreme Court has balanced the public's right to know against competing individual constitutional interests on a case-by-case basis.⁷² *Associated Press* and *Great Falls Tribune*,

68. Brief of Defendant and Appellant at 37-38, *Associated Press* (No. 89-589). "Meeting" arguably is not ambiguous in light of MONT. CODE ANN. § 2-3-202 (1991) which states: "[M]eeting" means the convening of a quorum of the constituent membership of a public agency or association described in 2-3-203, whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power." See also *Board of Trustees v. Board of County Comm'rs*, 186 Mont. 148, 152-56, 606 P.2d 1069, 1071-73 (1980) (discussing statutes that regulate "meetings"); 42 Op. Atty' Gen. 198, 198-99 (1988) (finding that "discussions between the director of the Department of Fish, Wildlife, and Parks and representatives of the Confederated Salish and Kootenai Tribes are [not] subject to Montana's open meeting statutory provisions . . . because the director of the Department, when acting alone on behalf of the Department, does not fall within the scope of the term 'quorum of the constituent membership' [as defined by 2-3-202]").

69. *Associated Press*, 246 Mont. at 391-92, 804 P.2d at 379.

70. *Id.*, at 391, 804 P.2d at 379. In past cases, after finding ambiguities, the court looked to and drew from these very sources. See, e.g., *Missoulian v. Board of Regents of Higher Educ.*, 207 Mont. 513, 522, 675 P.2d 962, 967 (1984) (citing delegate Dorothy Eck's statement on behalf of the Bill of Rights Committee at the 1978 Montana Constitutional Convention with regard to the right-to-know provision).

71. *Associated Press*, 246 Mont. at 392, 804 P.2d at 380.

72. See, e.g., *Missoulian*, 207 Mont. at 533, 675 P.2d at 973 (holding "that the demands of individual privacy of university presidents and other university personnel in confidential job performance evaluation sessions of the Board of Regents clearly exceed any merit of public disclosure"); *Engrav v. Cragun*, 236 Mont. 260, 267-68, 769 P.2d 1224, 1229 (1989) (holding that individual privacy rights in law enforcement telephone logs, criminal investigation records, and pre-employment records outweigh a university student's desire to

however, present situations in which the court balanced the public's right to know against competing public agency constitutional interests. To date, the court has not identified any public agency constitutional right that outweighs the public's right to know.

In *Associated Press* the supreme court dismissed the Board's contention that the Board's constitutional right to due process, on balance, was superior to that of the public's constitutional right to know.⁷³ An underpinning of the court's rejection of the Board's contention was the general rule that neither the State nor its political subdivisions have a constitutional right to due process.⁷⁴ The court based its rejection on the United States Supreme Court's decision in *South Carolina v. Katzenbach*, which held that the word "person" in the Fifth Amendment Due Process Clause cannot be expanded to include states.⁷⁵ Montana authority also exists for this proposition.⁷⁶ However, should an individual defendant rather than a governmental entity come before the court, due process arguments may be applicable.

In *Great Falls Tribune* the Trustees suggested that the constitutional mandate that school district trustees supervise and control schools should outweigh the public's right to know.⁷⁷ The Trustees suggested further that supervision and control "include a duty to bargain effectively and to spend monies in an effective and responsible manner."⁷⁸ The Trustees' argument, however, failed to persuade the court. Rather, the court found that the power to control schools did not confer a power to ignore other constitutional guarantees.⁷⁹

The court's decision in *Great Falls Tribune* highlights two approaches to reviewing the Montana constitutional right-to-know clause. When the court considers an individual's right to privacy versus the public's right to know, the court applies a balancing

do a study for a school research project); *Belth v. Bennett*, 227 Mont. 341, 345, 740 P.2d 638, 640-41 (1987) (holding that a corporation can assert the right-to-privacy exception and governmental agencies can assert the privacy interests of another); *State ex rel. Great Falls Tribune*, 238 Mont. at 320, 777 P.2d at 351 (holding that "closure for a probation revocation proceeding [is appropriate to avoid the] danger of harm to a person involved").

73. *Associated Press*, 246 Mont. at 390-91, 804 P.2d at 378-79.

74. *Id.* (citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

75. *Katzenbach*, 383 U.S. at 323-24.

76. *See Fitzpatrick v. State Bd. of Examiners*, 105 Mont. 234, 241, 70 P.2d 285, 288 (1937).

77. *Great Falls Tribune*, 255 Mont. at 129-30, 841 P.2d at 504-05. *See* MONT. CONST. art. X, § 8 which states: "The supervision and control of schools in each school district shall be vested in a board of trustees"

78. *Great Falls Tribune*, 255 Mont. at 130, 841 P.2d at 504.

79. *Id.* at 130, 841 P.2d at 505.

test, and the individual's right to privacy generally prevails.⁸⁰ However, when the court considers a public agency's constitutional mandate versus the public's right to know, the balancing test is unnecessary, and the public's right to know appears to prevail again.⁸¹

While the court's decision in *Associated Press* appears to significantly increase access to public agency meetings, the facts of the case actually require a much narrower interpretation of the holding. Under the facts of the case, the court merely held that when public agencies meet in a quorum and discuss potential litigation between public entities, the public agency must do so in a meeting open to the public.⁸² The issue of whether a state agency can close its meeting to discuss litigation with a private individual was not addressed by the court in *Associated Press*. For example, the court might find constitutional a statute allowing a public agency to close a meeting regarding potential litigation strategy between a state agency and an individual. Moreover, the court's holding in *Associated Press* does not suggest that the legislature is precluded from adopting statutes balancing an individual's privacy against the merits of public disclosure.

Further, while the supreme court is clear on what exceptions are allowed to the public's constitutional right to know, the court may find specific terminology relating to the terms "deliberations," "meeting," and "documents" ambiguous. Several statements made by the district court judge in his opinion and order in *Associated Press* may increase the significance of these terms to future litigation.⁸³ Therefore, the court may be called upon to interpret Article

80. See *Mountain States Tel. & Tel. Co. v. Department of Pub. Serv. Regulation*, 194 Mont. 277, 287-89, 634 P.2d 181, 188 (1981) (compelling state interest must be shown when statute affects a fundamental right). The Attorney General suggested the following balancing test: "(1) determin[e] whether a matter of individual privacy is involved, (2) determin[e] the demands of that privacy and the merits of publicly disclosing the information at issue, and (3) decid[e] whether the demand of individual privacy *clearly* outweighs the demand of public disclosure." 37 Op. Att'y Gen. 716, 719 (1978). To determine if a right of privacy is involved, the supreme court looks to "whether the person involved ha[s] a subjective or actual expectation of privacy" and, if so, "whether society is willing to recognize that expectation as reasonable." *Citizens to Recall Mayor Whitlock v. Whitlock*, 255 Mont. 517, 522, 844 P.2d 74, 77 (1992).

81. *Great Falls Tribune*, 255 Mont. at 130-31, 841 P.2d at 505.

82. *Associated Press*, 246 Mont. at 392, 804 P.2d at 379-80.

83. In his Opinion and Order, District Judge Sherlock suggests several ways lawyers can deal with their public agency clients without violating the public's constitutional right to know:

Counsel for the State and its agencies can prepare a case for trial without discussing plans in detail with agency clients during public meetings.

Article II, Section 9 does not state that public lawyers must reveal client secrets or that they may not communicate with their clients in confidence. . . .

II, section 9 further.

The 1993 Montana Legislature amended section 2-3-203 by deleting the statutory collective bargaining exception from subsection (4).⁸⁴ The legislature, however, has attempted to retain some semblance of a litigation exception.⁸⁵ The newly revised section 2-3-203(4)(B) is an apparent attempt by the legislature to codify the supreme court's holding in *Associated Press*.⁸⁶ Section 2-3-203(4)(A), however, suggests either that litigation between a public body or association and an individual is not adequately protected by section 2-3-203(3) or, possibly, that the supreme court would find a constitutional exception for litigation between a public body or association and some other entity. The outcome of the constitutionality of the legislature's newly revised section 2-3-203(4) remains to be seen, although little if anything in the court's recent decisions suggests the exception found in the newly revised section

Article II, Section 9 requires only that when a *quorum* of a board is present, the meeting must be open, even when litigation strategy is an agenda item. . . .

. . . [N]othing prevents the attorney from discussing litigation strategy in private with members of the body singly, or in groups of less than a quorum.

Opinion and Order at 30-31, *Associated Press* (No. 89-589). See also *supra* note 68.

84. S.B. No. 250, 53d Mont. Leg., 1993 Mont. Laws 123.

85. Senate Bill 250 read:

(1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds must be open to the public.

(2) All meetings of associations that are composed of public or governmental bodies referred to in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the public.

(3) Provided, however, the presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting *must* be open.

(4) (A) *However, except as provided by subsection (4)(B), a meeting may be closed to discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental effect on the litigating position of the public agency.*

(B) *A meeting may not be closed to discuss strategy to be followed in litigation in which the only parties are public bodies or associations described in subsections (1) and (2).*

(5) Any committee or subcommittee appointed by a public body or an association described in subsection (2) for the purpose of conducting business which is within the jurisdiction of that agency is subject to the requirements of this section.

Id. (amendments italicized).

86. Committee minutes for S.B. 250 were unavailable at the time this Article went to press, so the authors were unable to determine with more accuracy what the legislative intent behind S.B. 250 may have been.

2-3-203(4) is any more constitutional than the exceptions found in the old version.

The ramifications of the court's decision in *Great Falls Tribune* may be even more far-reaching than those of the *Associated Press* decision. Given the court's dislike of clandestine meetings conducted to avoid the public right-to-know provision,⁸⁷ school boards and other affected public bodies and associations appear to be left with negotiating collective bargaining agreements in open meetings where the opposition will be fully aware of their bargaining strength. This unequal bargaining strength may undermine public agencies' ability to fully represent the public's interest. Unfortunately, more than 500 school districts in Montana are left with little guidance as to how to proceed absent closed strategy sessions. Efficient and effective functioning of governmental agencies also may be affected by strong lobbyist groups who influence the agencies in a manner neither anticipated nor desired by the public. Resolution of these issues is left for future determination.

On balance, however, public agency decisions are the public's business. If the public feels agency discussions of litigation and collective bargaining strategies in open meetings are detrimental to the public's interests, the public can amend the constitution to provide otherwise. Until then, the Montana Supreme Court will likely continue construing the right-to-know provision in favor of public access, particularly in the absence of individual privacy concern considerations.

V. CONTRACT LAW

Weber v. Rivera: Montana's Approach to Liquidated Damages Highlighted in the Real Estate Context

Mr. and Mrs. Rivera traveled from California to Montana, interested in purchasing real property. After viewing the Weber ranch property, the Riveras offered to purchase the property for \$430,000, deposited \$5,000 in earnest money, and signed a form purchase contract. The local real estate agency's national sponsor, United National Real Estate, provided the form and required its use. The Webers subsequently executed the contract.⁸⁸ Shortly thereafter, the Riveras refused to perform under the contract because lab results indicated that the water at the Weber residence

87. *Flesh v. Board of Trustees*, 241 Mont. 158, 163, 786 P.2d 4, 7 (1990) (noting that "[t]his [c]ourt disapproves of clandestine meetings of public bodies which violate the spirit and the letter of the open meeting laws").

88. *Weber v. Rivera*, 255 Mont. 195, 196-97, 841 P.2d 534, 535 (1992).

was contaminated. The Webers then sued for breach of contract.⁸⁹ The trial court determined that the Riveras knew about the water quality prior to executing the contract. Their refusal to perform was, therefore, a breach of the purchase contract.⁹⁰

As is customary in the real estate industry, the purchase agreement contained a liquidated damages provision. That provision provided that in the event of breach, the breaching party would pay the non-breaching party ten percent of the purchase price. The district court thus awarded the Webers the amount stipulated in the purchase agreement—ten percent of \$430,000.⁹¹ On appeal, the supreme court reversed, holding the liquidated damages provision void as a penalty because it was “not the result of a reasonable estimate in advance to determine what the damages might be.”⁹²

In *Weber v. Rivera* the Montana Supreme Court continued to void contract provisions that the court perceives as penal. Penalty provisions are generally inserted in contracts “to coerce performance rather than to estimate damages.”⁹³ Section 28-2-721 of the Montana Code states that provisions fixing damages in advance are void unless at the time of contracting, “it would be impracticable or extremely difficult to fix the actual damage.”⁹⁴ In *Morgen & Osgood Construction Co. v. Big Sky of Montana, Inc.* the court ventured beyond the statute to attach the additional requirement that the amount specified be a reasonable estimate of the actual damages.⁹⁵ Uniform Commercial Code Article 2 and the Restatement of Contracts endorse liquidated damages in an amount that is reasonable in light of the anticipated or actual damages and declare unreasonably high liquidated damages void as a penalty.⁹⁶

Traditionally, courts have applied a three-pronged test to distinguish whether a provision stipulating damages is a valid liquidated damages provision or void as a penalty provision.⁹⁷ In *Mor-*

89. *Id.* at 197-98, 841 P.2d at 535-36.

90. *Id.* at 199, 841 P.2d at 536.

91. *Id.* at 199-200, 841 P.2d at 537.

92. *Id.* at 201, 841 P.2d at 538.

93. Justin Sweet, *Liquidated Damages in California*, 60 CAL. L. REV. 84, 92 (1972). Similarly, fear of contracts of adhesion has caused courts and legislatures to increase legal controls over the freedom of contract. *Id.* at 85.

94. MONT. CODE ANN. § 28-2-721 (1991).

95. *Morgen & Osgood Constr. Co. v. Big Sky of Mont., Inc.*, 171 Mont. 268, 273-74, 557 P.2d 1017, 1020-21 (1976).

96. See U.C.C. § 2-718(1) (1990) (appearing in identical form in MONT. CODE ANN. § 30-2-718(1) (1991)); U.C.C. § 2A-504(1) (1990) (appearing in identical form in MONT. CODE ANN. § 30-2A-504(1) (1991)); RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1979).

97. See *Morgen & Osgood*, 171 Mont. at 273, 557 P.2d at 1020; JOHN D. CALAMARI &

gen & Osgood, the court set forth the three prongs in an often-quoted paragraph:

Whether the forfeiture provision imposed a penalty, or provided for liquidated damages, is to be determined from the language and subject matter of the contract, the evident [1] *intent of the parties* and all the facts and circumstances under which the contract was made. The most important facts to be considered are [2] *whether the damages were difficult to ascertain*, and [3] *whether the stipulated amount is a reasonable estimate of probable damages or is reasonably proportionate to the actual damage sustained at the time of the breach*.⁹⁸

With respect to the first prong of the *Morgen & Osgood* test—the parties' intent, the fact that the parties labeled a provision as either a penalty or a liquidated damages clause is not determinative of intent.⁹⁹ Additionally, the second prong on its face appears met in *Weber* since real estate valuation is at best an imprecise art. The real estate market's tendency to fluctuate rapidly makes accurate estimation of potential damages difficult, if not impossible.¹⁰⁰

According to commentators, the third prong is determinative in most courts.¹⁰¹ The present case is no exception. However, in *Weber* the court's interpretation of the language of the third prong—reasonable estimate of probable damages—requires more than a provision setting forth the real estate industry's standard estimate of probable damages.¹⁰² The *Webers* argued that the third prong was met, but the court dismissed "any relationship between the amount of actual damages suffered and the amount specified in the provision [as] merely a fortuitous coincidence and not the result of a reasonable estimate in advance to determine what the damages might be."¹⁰³ The court's understanding of the third prong appears to incorporate notions of intent from the first prong, as manifested in something more than reading the contract before

JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 14-31 (3d ed. 1987).

98. *Morgen & Osgood*, 171 Mont. at 273, 557 P.2d at 1020 (emphasis added) (quoting *Waggoner v. Johnston*, 408 P.2d 761, 769 (Okla. 1965)).

99. See *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 120-21 (1907); *Morgen & Osgood*, 171 Mont. at 272-73, 557 P.2d at 1020-21; CALAMARI & PERILLO, *supra* note 97, at 641.

100. See *Thomas B. Hartley Constr. Co. v. Liberty Life Ins. Co.*, 371 S.E.2d 657, 660 (Ga. Ct. App. 1988) (Beasley, J., dissenting), *rev'd*, 375 S.E.2d 222, 223 (Ga. 1989).

101. See CALAMARI & PERILLO, *supra* note 97, at 641 & n.46.

102. *Weber*, 255 Mont. at 200, 841 P.2d at 537-38. But cf. *Liberty Life Ins. Co.*, 371 S.E.2d at 659 ("A 10 percent liquidated damages provision is not unusual in the real estate industry and is an accepted pre-estimate of damages.").

103. *Weber*, 255 Mont. at 201, 841 P.2d at 538.

signing.

The court implies that the standard forms used in real estate transactions are unfair. Also, the court implies that even if the parties did read the provision in the contract, they did not understand it. If the parties had understood the provision, the court suggests that the parties would have reasonably estimated the potential damages should either party breach the contract, and the parties then would have modified the form accordingly.¹⁰⁴

In light of the court's holding in *Weber*, real estate companies doing business in Montana should consider redrafting their standard form purchase contract to provide clearer notice of liquidated damages provisions and the consequences of these provisions. Real estate companies might consider providing their Montana agents with a variation of the forms used in California. In California, a statute requires that a liquidated damages "provision in a contract to purchase and sell real property . . . [be] separately signed or initialed by each party . . . [and be] set out either in at least 10-point bold type or in contrasting red print in at least eight-point bold type."¹⁰⁵ "Flagging" a liquidated damages provision in this manner may provide clearer notice to the parties. However, the parties must also "attempt to determine [in advance] what the actual damages might be" to meet the requirements of *Weber*.¹⁰⁶ This latter requirement might be satisfied by leaving blank the amount in the damages provision for the parties to reasonably estimate.

The significant change required in the area of liquidated damages law, specifically in the real estate context, can most appropriately be addressed by the legislature. The Montana Legislature should consider amending section 28-2-721 of the Montana Code to include the additional requirement of *Morgen & Osgood*: that the amount specified in a liquidated damages provision be a reasonable estimate of the actual damages. Montana adopted its present statutory scheme from California in 1895.¹⁰⁷ Considering that several years ago California abandoned the statutory liquidated damages scheme upon which Montana now relies,¹⁰⁸ Montana legislators might turn to California's current statutory scheme for

104. See *id.* at 200-01, 841 P.2d at 537-38.

105. CAL. CIV. CODE § 1677 (West 1985).

106. *Weber*, 255 Mont. at 201, 841 P.2d at 538.

107. See MONT. CODE ANN. § 28-2-721 (1991).

108. See Michael J. Mais & Paul B. Martins, Comment, *Title 4.5: California Liquidated Damages*, 16 SAN DIEGO L. REV. 967, 967 & n.1 (1979) ("The [1978] enactment amended six statutes, repealed two others, and added two more statutes to the body of California liquidated damages law.").

insight.¹⁰⁹

VI. CRIMINAL LAW

A. *State v. Allen: Impractical, Inconvenient, or Immaterial?—Montana's Exigency Requirement for Warrantless Automobile Searches*

The issue before the Montana Supreme Court in *State v. Allen*¹¹⁰ centered on whether the warrantless stop and search of the defendant's vehicles violated his constitutional rights.¹¹¹ The Fourth Amendment to the United States Constitution, as well as Article II, section 11 of the Montana Constitution, provide that individuals shall be free from unreasonable searches and seizures.¹¹² In *Allen* the court held that neither constitutional provision was violated because the officers' actions were justified based on probable cause and exigent circumstances.¹¹³

The Montana Supreme Court's conclusion in *Allen* is flawed for several reasons. First, the court failed to distinguish Montana's "automobile exception" (and accompanying exigency requirement) from its federal counterpart. Second, the court defined exigent circumstances so broadly that it rendered the exigency requirement virtually immaterial. Third, the court's reliance on *California v. Acevedo*¹¹⁴ was misplaced. Finally, the court failed to note that the warrantless search in *Allen* produced no evidence to suppress.

In the early afternoon on April 9, 1990, the defendant's daughter-in-law informed the Kalispell Police Department that the defendant would be returning that evening from out of state with a shipment of marijuana. The informant described the defendant's vehicle and the manner in which he concealed the marijuana in spare tires. After eight hours on stakeout, two police officers stopped the defendant's truck. The officers held the defendant at gunpoint on the reasonable belief that he might resist while they searched him, the truck, and the vehicle being towed. The officers

109. While the California statutes provide Montana legislators a point of departure, they are fraught with difficulties themselves. See *id.* at 998-1001 (noting inherent ambiguities in California's 1978 enactments); Jeffrey B. Coopersmith, Comment, *Refocusing Liquidated Damages Law for Real Estate Contracts: Returning to the Historical Roots of the Penalty Doctrine*, 39 EMORY L.J. 267, 294-99 (1990) (discussing the drawbacks of California's liquidated damages statutory scheme while proposing that Georgia adopt somewhat similar provisions).

110. — Mont. —, 844 P.2d 105 (1992).

111. *Id.* at —, 844 P.2d at 106.

112. See U.S. CONST. amend. IV; MONT. CONST. art. II, § 11.

113. *Allen*, — Mont. at —, 844 P.2d at 108-10.

114. 111 S. Ct. 1982 (1991).

read the defendant his Miranda rights and informed him that while he was not yet under arrest, they would be impounding his vehicles. A search of the towed vehicle by a police dog at the scene corroborated earlier information on where the marijuana would be stored. However, this initial search produced no real evidence. The officers then drove the defendant to his home where they searched his home and seized a tire iron discovered in the defendant's basement. The State contended the defendant verbally consented to all searches. The defendant denied giving any consent.¹¹⁵

Section 46-5-101 of the Montana Code requires law enforcement officers to obtain a search warrant whenever a search is made of a person, object, or place unless the search is in accordance with recognized exceptions.¹¹⁶ To satisfy the automobile exception to the warrant requirement in Montana, the State must satisfy two prongs: "(1) the existence of probable cause to search; and (2) the presence of exigent circumstances, that is, that it was not practicable under the circumstances to obtain a warrant."¹¹⁷ In contrast, the federal common law automobile exception to the warrant requirement requires probable cause only.¹¹⁸

The exigency requirement of the federal automobile exception was largely eliminated by the United States Supreme Court for two reasons. The Supreme Court enunciated long ago the first and more practical reason—that the automobile's mobility enabled evidence in an automobile to be quickly transported outside the jurisdiction.¹¹⁹ More recently, when the Court's mobility rationale appeared weakened by the facts presented in *Chambers v. Maroney*, the Court announced that an individual's expectancy of privacy was lower in an automobile than in the individual's home.¹²⁰

In *Allen* the court wrongly found satisfied the second prong of Montana's automobile exception—exigent circumstances.¹²¹ In support of this finding, the State's argument was essentially two-

115. *Allen*, ___ Mont. at ___, 844 P.2d at 106-07.

116. "A search of a person, object, or place may be made and evidence, contraband, and persons may be seized in accordance with Title 46 when a search is made: (1) by the authority of a search warrant; or (2) in accordance with recognized exceptions to the warrant requirement." MONT. CODE ANN. § 46-5-101 (1991).

117. *Allen*, ___ Mont. at ___, 844 P.2d at 108 (citing *State v. Cripps*, 177 Mont. 410, 422, 582 P.2d 312, 319 (1978)).

118. See *California v. Carney*, 471 U.S. 386, 392 (1985); *Colorado v. Bannister*, 449 U.S. 1, 3 (1980) (per curiam); *Coolidge v. New Hampshire*, 403 U.S. 443, 463-64 (1971); *Carroll v. United States*, 267 U.S. 132, 161-62 (1925).

119. *Carroll*, 267 U.S. at 153.

120. *Chambers v. Maroney*, 399 U.S. 42, 49-52 (1970). See also *Carney*, 471 U.S. at 391-92.

121. *Allen*, ___ Mont. at ___, 844 P.2d at 109-10.

fold. First, insufficient time existed for the police officers to secure a warrant. Second, an insufficient number of officers were available to safely conduct the search if one were released to secure a warrant.¹²² The facts, however, indicate otherwise.

The police officers had sufficient time to secure a warrant. The informant contacted the police early Saturday afternoon saying "the defendant would arrive some time during the evening."¹²³ The stakeout began at 5:00 p.m. The police officers stopped defendant at approximately 2:00 a.m. The police officer "testified that obtaining a search warrant on [the weekend] would have taken approximately four hours."¹²⁴ It is highly probable that had the officer sought a warrant early in the afternoon, immediately after establishing probable cause, the officer would have had the warrant in hand before setting up the stakeout or shortly thereafter. Additionally, the officers had sufficient time to obtain a warrant even if an officer had pursued a warrant when the stakeout began at 5:00 p.m. The dissent suggests that the reason the officers did not follow the weekend procedure to secure a warrant was inconvenience rather than the impracticability required by law.¹²⁵

Despite the police officers' belief that "it was 'more important' to set up the stakeout than to obtain a warrant,"¹²⁶ a sufficient number officers were available to pursue both. According to the officer in charge, because of the defendant's potential dangerousness, more than one officer was needed at the stakeout.¹²⁷ Yet, after more than eight hours on stakeout, the third officer was permitted to go home and rest.¹²⁸

In finding that the warrantless stop and search did not violate the defendant's constitutional rights, the Montana Supreme Court in *Allen* relied heavily on *California v. Acevedo*.¹²⁹ The court's reliance, however, is misplaced. In *Acevedo* the police officers had probable cause to search a container that the defendant had placed in the trunk of his automobile.¹³⁰ The United States Supreme Court held in *Acevedo* that the officers' subsequent stop of the defendant's vehicle and search of the container were constitutional

122. *Id.* at ___, 844 P.2d at 109.

123. *Id.* at ___, 844 P.2d at 110.

124. *Id.* at ___, 844 P.2d at 110.

125. *Id.* at ___, 844 P.2d at 111 (Gray, J., dissenting).

126. *Id.* at ___, 844 P.2d at 111 (Gray, J., dissenting).

127. *Id.* at ___, 844 P.2d at 109.

128. *Id.* at ___, 844 P.2d at 107.

129. *Id.* at ___, 844 P.2d at 109-10.

130. *Acevedo*, 111 S. Ct. at 1991.

based on *United States v. Ross*,¹³¹ which enables officers with probable cause to stop and search "every part of the vehicle and its contents that may conceal the object of the search."¹³²

In choosing to follow *Ross*, the Supreme Court in *Acevedo* abandoned a conflicting line of cases based on *United States v. Chadwick*¹³³ and *Arkansas v. Sanders*.¹³⁴ The *Chadwick-Sanders* line of cases held that the police could seize a closed container obtained in a warrantless vehicle search where probable cause focused on the container alone.¹³⁵ However, the police could not conduct a warrantless search of the container because people retain a legitimate expectation of privacy in closed containers.¹³⁶

The problem with the Montana Supreme Court's reliance on *Acevedo* lies in the premise upon which both *Acevedo* and *Ross* are based. *Acevedo* and *Ross* involved the special problem of opening containers during an otherwise lawful warrantless search.¹³⁷ Those warrantless searches were lawful because under the United States Constitution, the Supreme Court held "the police may search without a warrant if their search is supported by probable cause."¹³⁸ In *Allen*, however, a lawful warrantless search did not exist because under Montana law probable cause alone, which the Montana Supreme Court found,¹³⁹ is not enough to stop and search a vehicle or containers within a vehicle. Exigent circumstances must also exist,¹⁴⁰ which appeared lacking in *Allen*.

The court failed to clearly state that under the Montana Constitution the automobile exception is a higher standard, requiring exigent circumstances in addition to probable cause,¹⁴¹ than the automobile exception under the United States Constitution.¹⁴² However, at least two Montana Supreme Court decisions prior to *Allen* also failed to acknowledge Montana's higher standard.¹⁴³ In fact, the court in *State v. Broell* said that if probable cause exists

131. *Id.*

132. *United States v. Ross*, 456 U.S. 798, 825 (1982).

133. 433 U.S. 1 (1977).

134. 442 U.S. 753 (1979).

135. *Id.* at 761-66 (citing *Chadwick*, 433 U.S. at 13).

136. *Id.* at 764-66.

137. *Acevedo*, 111 S. Ct. at 1991; *Ross*, 456 U.S. at 825.

138. *Acevedo*, 111 S. Ct. at 1991.

139. *Allen*, ___ Mont. at ___, 844 P.2d at 108-09.

140. *Id.* at ___, 844 P.2d at 109-10.

141. *Id.* at ___, 844 P.2d at 108 (citing *Cripps*, 177 Mont. at 422; 582 P.2d at 319; *State v. Amor*, 164 Mont. 182, 184-85, 520 P.2d 773, 775 (1974); and *Coolidge*, 403 U.S. at 458-64—all of which are pre-*Carney* cases).

142. *Carney*, 471 U.S. at 392.

143. See *State v. Broell*, 249 Mont. 117, 122-23, 814 P.2d 44, 47 (1991); *State v. Evjen*, 234 Mont. 516, 519-20, 765 P.2d 708, 710-11 (1988).

"to believe such automobile's contents 'offend against the law,' " a warrantless automobile search or seizure is valid.¹⁴⁴ Possibly no real distinction exists between the federal and state automobile exception to warrant requirement. Perhaps Justice Scalia's remarks in his concurrence in *Acevedo* ring true for Montana as well: "There can be no clarity in this area unless we make up our minds, and unless the principles we express comport with the actions we take."¹⁴⁵

The Montana Supreme Court attempted to clarify this area when it quoted the clear-cut rule of *Acevedo* to support the proposition that one rule now governs automobile searches under both federal and state law.¹⁴⁶ The confusion that the Court in *Acevedo* intended to resolve with "one clear-cut rule" involved the distinction "between a container for which the police are specifically searching and a container which they come across in a car."¹⁴⁷ That clear-cut rule governs the special problem of opening containers in automobile searches. But in *Allen* no special problem of opening containers existed because the officers in *Allen* followed the *Chadwick-Sanders* rule, not *Ross*, by immediately seizing the vehicles and their closed containers—the spare tires—and later seeking the necessary search warrant to search the vehicles and their containers—the spare tires.¹⁴⁸

Finally, that the officers did not search the containers until a warrant was secured raises the question of what evidence of the warrantless search the defendant sought to suppress. The warrantless search or "investigatory stop" of the defendant's vehicles in the early hours of April 8, 1990, produced no evidence to suppress.¹⁴⁹ The police later obtained the incriminating evidence pursuant to a warrant.¹⁵⁰ Thus, the court did not need to look any further in affirming the district court decision.¹⁵¹

144. *Broell*, 249 Mont. at 122, 814 P.2d at 47 (citing *Evjen*, 234 Mont. at 519-20, 765 P.2d at 711).

145. *Acevedo*, 111 S. Ct. at 1993.

146. *Allen*, ___ Mont. at ___, 844 P.2d at 110.

147. *Acevedo*, 111 S. Ct. at 1988.

148. *Allen*, ___ Mont. at ___, 844 P.2d at 107.

149. *Id.* at ___, 844 P.2d at 107.

150. *Id.* at ___, 844 P.2d at 107.

151. See *Broell*, 249 Mont. at 123, 814 P.2d at 47, where the court noted that: even if we were to conclude that [the defendant's] car was unlawfully seized, we still would not find error in the denial of the motion to suppress. Evidence secured from an impounded automobile will not be suppressed when such automobile is searched pursuant to a warrant that is based on information wholly independent of the seizure:

"The items were secured during a search conducted pursuant to a warrant."

Id.

Nonetheless, in *State v. Allen* the Montana Supreme Court rendered the exigent circumstances prong of the automobile exception to the general warrant requirement virtually immaterial. Following *Allen*, to stop and search a person's vehicle and the containers found therein, the police must have both probable cause and exigent circumstances. However, exigent circumstances may exist in Montana if law enforcement officers determine that securing a warrant would be impracticable or even inconvenient.¹⁵²

B. State v. Davis: Is the Confrontation Clause Satisfied by an Opaque Screen?

In *State v. Davis*¹⁵³ the Montana Supreme Court considered whether placing an opaque screen between the defendant and the child witnesses violated the Confrontation Clause of the Sixth Amendment to the United States Constitution.¹⁵⁴ The court held that the trial court did not err in permitting the opaque screen between the defendant and the child witnesses while testifying. The court relied on the district court's individualized finding of necessity.¹⁵⁵

According to school officials, the child, J.R., appeared unhealthy and regularly came to school dirty. J.R.'s teacher described J.R. as "emotionally underdeveloped." A social worker interviewed J.R., a kindergartner, for the second time, at the request of J.R.'s teacher. During the interview J.R. explained how her babysitter sexually assaulted her. The social worker placed J.R. in a foster home the next day. The following day, J.R. identified the defendant in a photographic lineup. Two weeks later the police arrested the defendant.¹⁵⁶

Prior to trial the district court granted the State's motion to place a temporary opaque screen between the defendant and the witness stand during the child witnesses' testimony at trial. The screen's placement allowed the judge and both counsel, but not the defendant, to view the child witnesses. The defendant objected to the screen's placement between him and the child witnesses on the ground that it violated his federal constitutional right to confront the witnesses against him.¹⁵⁷ The district court found the defend-

152. *Allen*, — Mont. at —, 844 P.2d at 111 (Gray, J., dissenting).

153. 253 Mont. 50, 830 P.2d 1309 (1992).

154. *Id.* at 52, 830 P.2d at 1311.

155. *Id.* at 56-59, 830 P.2d at 1314-15.

156. *Id.* at 52-53, 830 P.2d at 1311.

157. *Id.* at 54, 830 P.2d at 1312. The Sixth Amendment to the United States Constitution states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right

ant guilty.¹⁵⁸

The majority in *Davis* began its analysis by noting that the defendant failed to preserve his right of review on appeal with respect to violation of Article II, section 24 of the Montana Constitution because he merely objected at trial based on the Confrontation Clause of the United States Constitution.¹⁵⁹ Justice Trieweller's special concurrence intimates that had the defendant's objection been based on the Montana Constitution, the outcome of the court's decision in *Davis* would have been different.¹⁶⁰

The dissent in *Davis* suggests,¹⁶¹ as do the United States Supreme Court decisions upon which the majority in *Davis* relied, that the outcome of *Davis* would have been different if heard by the United States Supreme Court. In *Davis*, the Montana Supreme Court juxtaposed two relatively recent United States Supreme Court decisions—*Coy v. Iowa*¹⁶² and *Maryland v. Craig*.¹⁶³ In *Coy*, the more analogous of the two cases, the United States Supreme Court considered for the first time the constitutionality of special procedures employed to protect child witnesses in sex abuse cases from the potential for trauma involved in facing the alleged perpetrator in open court.¹⁶⁴ In *Coy*, the witnesses, two thirteen-year-old girls, testified behind a screen that enabled the judge, jury, and both counsel to view the witnesses while blocking the witnesses' view of the defendant. Special lighting, however, enabled the defendant to view the demeanor of the witnesses as they testified. Additionally, the format used allowed the jury to consider the defendant's demeanor. Nevertheless, the Court held that the screening procedure employed in *Coy* violated the defendant's Sixth Amendment right to confront the witnesses against him.¹⁶⁵

Justice Scalia authored the majority opinion in *Coy* and applied a literal face-to-face meaning to the Confrontation Clause. The Court indicated that the Sixth Amendment's "irreducible literal meaning" of confrontation could be avoided "when necessary to further an important public policy."¹⁶⁶ However, the Court qual-

. . . to be confronted with the witnesses against him" U.S. CONST. amend. VI.

158. *Davis*, 253 Mont. at 53, 830 P.2d at 1312.

159. *Id.* at 54, 830 P.2d at 1312. Article II, section 24 of the Montana Constitution states in pertinent part: "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face." MONT. CONST. art. II, § 24.

160. *Davis*, 253 Mont. at 61-62, 830 P.2d at 1317.

161. *Id.* at 62-63, 830 P.2d at 1317-18 (McDonough, J., dissenting).

162. 487 U.S. 1012 (1988).

163. 497 U.S. 836.

164. *Coy*, 487 U.S. at 1014-15.

165. *Id.*

166. *Id.* at 1021-22.

ified this exception to the literal face-to-face meaning of the Confrontation Clause by requiring more than implied legislative intent. According to the Court, to invoke this exception requires an "individualized finding that . . . particular witnesses need[] special protection."¹⁶⁷

In *Craig* the lower court's individualized finding that the child witnesses needed special protection satisfied the qualified public policy exception of *Coy*.¹⁶⁸ The lower court believed that the witnesses, as victims, would have suffered severe trauma in an open-court confrontation. The lower court in *Craig* allowed the witnesses to testify by one-way closed circuit television.¹⁶⁹ In *Davis* the Montana Supreme Court followed the requisite Confrontation Clause elements set forth by the *Craig* majority: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.¹⁷⁰ The defendant's ability to observe the witnesses testifying against him, while present in *Coy* through the use of special lighting and present in *Craig* through the use of one-way closed circuit television, did not exist in *Davis*.¹⁷¹ The court in *Davis* found this distinction irrelevant, however, since the "basic" Confrontation Clause elements were present.¹⁷²

In *Davis* the majority's understanding of the Confrontation Clause elements enunciated in *Craig* seems narrow.¹⁷³ As noted by the dissent in *Davis*,¹⁷⁴ the Court in *Craig* specifically set forth other requisite elements of the Confrontation Clause, including the defendant's ability "to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testified."¹⁷⁵ The dissent in *Davis* found the defendant's inability to view the child witnesses while testifying distinguishable from both *Craig* and its predecessor, *Coy*. The dissent also found this distinction dispositive in *Davis*.¹⁷⁶ Federal case law supports the dissent.¹⁷⁷

Montana law expressly provides an alternative that may minimize the difficulties arising from the potentially traumatic experience for a child witness testifying against the assailant in open

167. *Id.* at 1021.

168. *Craig*, 497 U.S. at 860.

169. *Id.* at 840-43.

170. *Davis*, 253 Mont. at 56-58, 830 P.2d at 1314-15.

171. *Id.* at 62, 830 P.2d at 1317 (McDonough, J., dissenting).

172. *Id.* at 58, 830 P.2d at 1314-15.

173. *See id.* at 62-63, 830 P.2d at 1317-18 (McDonough, J., dissenting).

174. *Id.* at 63, 830 P.2d at 1318 (McDonough, J., dissenting).

175. *Craig*, 497 U.S. at 851.

176. *Davis*, 253 Mont. at 62-63, 830 P.2d at 1317-18.

177. *See Craig*, 497 U.S. at 857; *Coy*, 487 U.S. at 1020-22.

court.¹⁷⁸ The Montana alternative—previously videotaped testimony presentable at trial—is grounded in the hearsay exception of unavailable witnesses, another exception to the Confrontation Clause. Unfortunately, the statute may fall short in dealing with the delicate balance between granting the defendant the right to confront those testifying against him and the public policy concerns over the potentially traumatic experience for the child witness.

Under the current Montana videotaped testimony statute, the victim and prosecution may request the videotaping of testimony, and that testimony must be admitted into evidence at trial if it conforms to all applicable procedural and evidentiary rules of the state.¹⁷⁹ However, the videotaped testimony statute expressly states that the defendant “be allowed to attend the videotape proceedings.”¹⁸⁰ The question becomes one of meaning. Yet to be determined is whether “attend” will be construed literally to mean face-to-face or liberally to include mere presence in the same room without benefit of observation.

Justice Triewiler stated that “it is clear to [him] that the same result could not occur” under Article II, section 24 of the Montana Constitution.¹⁸¹ For this reason Justice Triewiler “encourage[d] prosecutors . . . to try to find some way to protect child victims which does not preclude the defendant from observing their demeanor and testimony while it is being given.”¹⁸² The solution to Justice Triewiler’s suggestion lies in the Maryland statute at issue in *Craig*.¹⁸³ However, Montana has no statutory authorization for live video testimony, as employed in *Craig*, allowing the witness to testify during trial from another room in the courthouse.¹⁸⁴ With the use of live video testimony, the difficulties asso-

178. See MONT. CODE ANN. § 46-16-216(1) (1991) which states in part: “[T]he testimony of the victim . . . may be recorded by means of videotape for presentation at trial. The recorded testimony may be presented at trial. The recorded testimony may be presented at trial and must be received into evidence. The victim need not be physically present in the courtroom when the videotape is admitted into evidence.”

179. MONT. CODE ANN. § 46-16-216(2) states: “The procedural and evidentiary rules of the state that are applicable to criminal trials within the state apply to the videotape proceedings authorized by this section.”

180. MONT. CODE ANN. § 46-16-216(3) (1991) states: “The district court judge, the prosecutor, the victim, the defendant, the defendant’s attorney, and other persons as are considered necessary by the court to make the recordings authorized under this section must be allowed to attend the videotape proceedings.”

181. *Davis*, 253 Mont at 61, 830 P.2d at 1317 (Triewiler, J., special concurrence to the majority opinion he authored).

182. *Id.* at 61-62, 830 P.2d at 1317.

183. *Craig*, 497 U.S. at 840-41 n.1.

184. At the time of the *Craig* decision, Maryland’s statutory procedure provided:

ciated with testifying in open court could be reduced. Moreover, all Confrontation Clause requirements delineated in *Craig* appear satisfied with the use of live video testimony: the witness would be physically present, under oath, subject to cross-examination, and observable by the trier of fact. Likewise, the defendant would be able to observe the witness's demeanor.¹⁸⁵

The opaque screen placed between the defendant and the child witnesses in *Davis* denied the defendant the ability to view the witnesses' demeanor during questioning. This prohibited the defendant from informing defense counsel of any tell-tale gestures of dishonesty unique to the witnesses. However, under the Montana Supreme Court's interpretation of *Coy* and *Craig*, the opaque screen did not violate the defendant's right to confront the witnesses against him under the United States Constitution. Consequently, in *Davis* the Montana Supreme Court erred in its interpretation and application of federal Confrontation Clause law.

To prevent future violations of the accused's right to confron-

(a) (1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:

(i) The testimony is taken during the proceeding; and

(ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

(b) (1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:

(i) The prosecuting attorney;

(ii) The attorney for the defendant;

(iii) The operators of the closed circuit television equipment; and

(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

(c) The provisions of this section do not apply if the defendant is an attorney pro se.

(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989).

185. *Craig*, 497 U.S. at 857.

tation, prosecutors should consider the use of previously recorded testimony of child witnesses, if appropriate under section 46-16-216, or, following an independent finding of necessity, live videotape testimony like that upheld in *Craig*. Furthermore, the legislature should consider either adopting a statutory procedure similar to that of Maryland or modifying section 46-16-216 of the Montana Code to include live videotape testimony.

C. *State v. Fertterer: Prosecutors Given Discretion to Prosecute Fish and Game Violations Under Title 45 Criminal Laws*

In *State v. Fertterer*¹⁸⁶ the Montana Supreme Court expanded Title 45's concept of property to include wild game within the scope of public property. Additionally, the court again endorsed prosecutorial discretion to select among various criminal charges, this time by subjecting fish and game violators to prosecution under either Title 45, the Montana Criminal Code, or Title 87, the Montana fish and game statutes, despite what some might consider apparent legislative attempts to specifically enumerate fish and game violations solely within Title 87.¹⁸⁷

In *Fertterer* following a Department of Fish, Wildlife, and Park's ten-month undercover investigation into the defendants' large-scale poaching operation in Montana, the defendants were tried and convicted of multiple counts of Title 45 felony criminal mischief and Title 87 misdemeanor fish and game violations.¹⁸⁸ At the time, Title 87 provided only for misdemeanor penalties, although the legislature has since amended Title 87 to include felony penalties as well.¹⁸⁹ Had the defendants been tried and convicted

186. 255 Mont. 73, 841 P.2d 467 (1992).

187. *Id.* at 79-82, 841 P.2d at 471-72.

188. *Id.* at 76, 841 P.2d at 468-69. More specifically, the defendants were convicted of the following:

The jury convicted Richard Fertterer of two counts of felony criminal mischief for illegally killing three elk, six deer and three antelope. It also convicted him of several misdemeanors under Title 87, MCA, including: two counts of outfitting without a license; two counts of unlawfully selling, transporting and possessing game; two counts of hunting with aid of artificial light; and one count of unlawfully trapping game animals.

Likewise the jury convicted David John Fertterer of two counts of felony criminal mischief for unlawfully killing one mountain lion and three elk. He was also convicted of several misdemeanors under Title 87, MCA, including: guiding without a license, unlawful sale or possession of game, hunting with aid of artificial light, and unlawful trapping of game animals.

Id. at 76, 841 P.2d at 469.

189. See MONT. CODE ANN. § 87-3-118(3) (1991) (titled "Sale or possession of unlawfully taken wildlife—penalty) which states: "A person who violates this section is guilty of a felony"

for their offenses solely under Title 87, their penalties would have been limited to fines of "not less than \$300 or more than \$1,000, [imprisonment] in the county jail for not more than [six] months, or both."¹⁹⁰ However, by subjecting the defendants to Title 45 felony criminal mischief convictions, the defendants' potential penalties increased significantly to a maximum fine of \$50,000, imprisonment "in the state prison for [a] term not to exceed [ten] years, or both."¹⁹¹

The defendants claimed on appeal that: (1) wild animals are not property or public property within the meaning of Montana's Title 45 Criminal Code, (2) Title 87 provides the exclusive remedy for the illegal taking of game, and (3) the criminal mischief statute, as applied to the defendants, is unconstitutionally vague.¹⁹² The Montana Supreme Court denied the defendants relief on all three issues.¹⁹³

Title 45, chapter 6 of the 1973 Criminal Code (titled "Offenses Against Property") consolidates numerous common law and statutory offenses into a few broadly defined criminal statutes. Section 45-6-101 of the Montana Code states: "A person commits the offense of criminal mischief if he knowingly or purposely . . . injures, damages, or destroys any property of another or public property without consent"¹⁹⁴ To convict the defendants of felony criminal mischief, therefore, the State had to show that the elk, deer, antelope, and mountain lion poached by the defendants were "property of another" or "public property." Since public property is not defined by the Criminal Code, much of the court's discussion of whether wildlife is public property or property of another centered on the theft statute concepts of ownership. Through a rather attenuated reading of the section 45-6-101 and despite what may be contrary intent,¹⁹⁵ the court extended the theft definitions of ownership to the crime of criminal mischief.¹⁹⁶ While noting that the Montana Supreme Court has long recognized the power of the

190. MONT. CODE ANN. § 87-1-102(2)(b) (1989).

191. MONT. CODE ANN. § 45-6-101(3) (1991).

192. *Fertterer*, 255 Mont. at 76, 841 P.2d at 468.

193. *Id.* at 80-83, 841 P.2d at 471-73.

194. MONT. CODE ANN. § 45-6-101(1)(a) (1991).

195. The Compiler's Comments (Annotator's Note) indicate that the definition of property of another "relates to Theft and Related Offenses (MCA, 45-6-301 through 45-6-327)" to permit "prosecution for theft of jointly-owned property." MONT. CODE ANN. § 45-2-101(55) compiler's comments (1991). *But see* *State v. Palmer*, 207 Mont. 152, 160-61, 673 P.2d 1234, 1238-39 (1983) (stating that Compiler's Comments do not have the force of law and are "clearly misleading").

196. *Fertterer*, 255 Mont. at 77-78, 841 P.2d at 469-70.

State "to regulate game animals,"¹⁹⁷ the court continued to avoid the question of whether the public property interest protected by the criminal mischief statute was based on the State's title ownership interest or regulatory interest. Regardless, the court found the State's interest superior to that of the defendants.¹⁹⁸

After determining that section 45-6-101 includes wildlife as "property of another" or "public property," the court addressed whether the legislature intended that fish and game violations be prosecuted exclusively under Title 87 or, alternatively, under both Title 87 and Title 45.¹⁹⁹ Although the court has not addressed this question head on with regard to fish and game statutes, the court has, in prior instances, approved of similar prosecutorial discretion when selecting between criminal charges to bring against a defendant found under different titles of the Montana Code.²⁰⁰ The su-

197. *Id.* at 79, 841 P.2d at 470-71. See also *State v. Jack*, 167 Mont. 456, 459-60, 539 P.2d 726, 728 (1975):

There is no question that a state has the power to preserve and regulate its wildlife. In the nineteenth century, it was commonly held that this power derived from the common law concept of "sovereign ownership". Under that doctrine, the ownership of wildlife was held by the state in trust for its people. Under more modern theory, the power has been held to lie within the purview of a state's police powers.

Montana recognizes both the doctrine of sovereign ownership and the police power theory. We need not decide which of these doctrines should now prevail in the state of Montana. In the area of wildlife regulation, it is sufficient to state the legislature may impose such terms and conditions as it sees fit, as long as constitutional limitations are not infringed.

Jack, 167 Mont. at 459-60, 539 P.2d at 728 (citations omitted).

198. *Fertterer*, 255 Mont. at 80, 841 P.2d at 469-71 (discussing both the state's "ownership" of wildlife and the state's "superior interest" in wildlife concluding "the State has a superior interest under the ownership theory and also has such an interest by virtue of its police power to regulate the taking of game" which "regulatory power was derived from the states' 'title ownership' in the game, and also from the states' police power").

199. *Id.* at 81, 841 P.2d at 471-72.

200. See *State v. Duncan*, 181 Mont. 382, 395-96, 593 P.2d 1026, 1034 (1979) (approving prosecution of defendant "under section [30-10-301], the specific fraudulent securities practices statute, rather than section [45-6-317], the general deceptive practices statute"). The court again declined to apply the civil rule of statutory construction that "a more specific statute controls over an inconsistent general statute, ' . . . to criminal prosecutions where defendant's conduct violated' two or more criminal statutes." *Id.* at 395, 593 P.2d at 1034 (quoting *State v. Moore*, 174 Mont. 292, 297, 570 P.2d 580, 583 (1977)). The court in both *Duncan* and *Moore* quoted the following language from *State v. Lagerquist*, 152 Mont. 21, 30-31, 445 P.2d 910, 915 (1968):

The fact that the legislature provides a course of action by more than one statute allows the state to choose either applicable law . . . "The fact that there is an area in which two statutes overlap and prohibit the same act . . . does not mean that the defendant can only be prosecuted under the statute providing for the lesser penalty."

See also *State v. Brady*, 249 Mont. 290, 295-96, 816 P.2d 413, 416 (1991) (upholding prosecutor's discretion to charge aggravated kidnapping rather than domestic abuse "where all of the elements of aggravated kidnapping were present in the case presented by the State").

preme court adopted the lower court's holding that the language of section 87-1-102 of the Montana Code does not evidence a clear intent to provide an exclusive remedy for fish and game violations under Title 87.²⁰¹

However, the court's statement that "none of the sections of Title 87 comprehensively define the [defendants'] conduct,"²⁰² is misplaced in that it ignores section 87-1-102(2)(b), which specifically sets forth the legislature's intent that conduct like the defendants' at that time results in a misdemeanor violation.²⁰³ Absent express legislative intent to provide exclusive remedies for violations of other areas of law, defendants may find themselves prosecuted under specific as well as general statutes. The court in *Fertterer* leaves prosecutors to choose among a panoply of crimes established by the legislature.

Finally, in *Fertterer*, the court discussed the defendants' claim that the criminal mischief statute is unconstitutionally vague as applied to their conduct.²⁰⁴ Having found that wild game is included within the criminal mischief statute's definition of property and, therefore, considered public property,²⁰⁵ the court quickly dismissed the defendants' vagueness claim, finding that "reasonable persons would have realized that the conduct of destroying wild animals without the consent of the State, specifically violated [section] 45-6-101(1)(a)."²⁰⁶ This assumes that the reasonable person did not look to Title 87 as the exclusive remedy for the crime committed. Taking the court's reasoning one step further, reasonable persons who commit acts similar to those committed by the defendants are now on notice that they may be in violation of other criminal statutes relying on the same definitions as section 45-6-

201. *Fertterer*, 255 Mont. at 81, 841 P.2d at 472.

202. *Id.* at 81, 841 P.2d at 472.

203. "A person convicted of unlawfully taking, killing, possessing, or transporting a deer, antelope, elk, mountain lion, or black bear or any part of these animals or wasting a deer, antelope, or elk shall be fined not less than \$300 or more than \$1,000, imprisoned in the county jail for not more than 6 months, or both." MONT. CODE ANN. § 87-1-102(2)(b) (1989). Neither the majority nor the three-justice dissent discuss this section (MONT. CODE ANN. § 87-1-102(b) (1989)).

204. *Fertterer*, 255 Mont. at 82-83, 841 P.2d at 472-73.

205. The Annotator's Notes to section 45-6-101 state:

The 1975 amendment inserted "or public property" after "property of another" in subdivisions (1)(a) There was some question whether public property was included in the original statute because "property of another" was defined as property in which another person had an interest (§45-2-101). The amendment was intended to make certain that property owned by any governmental entity or agency, or any other public body is within the protection of the statute.

MONT. CODE ANN. § 45-6-101 annotator's notes (1991) (second emphasis added).

206. *Fertterer*, 255 Mont. at 82, 841 P.2d at 472.

101, for example, Montana's felony theft statute.²⁰⁷

The court's decision in *Fertterer* is significant because the court has again endorsed prosecutorial discretion to select between various criminal statutes based on differences in potential penalties to be imposed. Of additional significance, wild game is now considered "property" and, more specifically, "public property" within the meaning of Title 45, chapter 6. To avoid having prosecutors pursue Title 87 fish and game violations under Title 45 criminal statutes, the legislature must explicitly address the issue of whether it intended that Title 87 provide the exclusive remedy for fish and game violations.

*D. State v. Valley: The Probable Cause Confusion Continues:
Without Adequate Police Corroboration, Anonymous Citizen
Informants are Not Presumed Reliable*

On April 1, 1988, detectives with the County Sheriff's Department searched the defendant's residence pursuant to a warrant issued by the district court. The issuing judge found probable cause based on: (1) two recent anonymous crimestopper tips provided by the same individual claiming the defendant sold marijuana; (2) police verification of the location described by the crimestopper tipster; and (3) three earlier occasions where other informants claimed the defendant was involved in growing, selling, or otherwise distributing marijuana. The detectives discovered sufficient evidence of crime in the defendant's residence, which the defendant later moved to suppress.²⁰⁸

Following a suppression hearing, the district court held that the three earlier informant claims "were in and of themselves too remote," but that the recent crimestopper tips were not so remote and served, in part, as the basis for probable cause.²⁰⁹ The district court's denial of the defendant's motion to suppress was "based on [the Montana Supreme] Court's application of the 'totality of the circumstances' [or *Gates*] test"²¹⁰ as applied in *State v. Rydberg*.²¹¹ On appeal the Montana Supreme Court concluded "that the application for the warrant did not [c]ontain sufficient facts and circumstances under the *Gates* test" and, therefore, reversed the district court's decision.²¹²

207. See generally MONT. CODE ANN. § 45-6-301 (1991).

208. *State v. Valley*, 252 Mont. 489, 490-92, 830 P.2d 1255, 1256-57 (1992).

209. *Id.* at 492, 830 P.2d at 1257.

210. *Id.*

211. 239 Mont. 70, 72-73, 778 P.2d 902, 903-04 (1989).

212. *Valley*, 252 Mont. at 494, 830 P.2d at 1258.

According to section 46-5-221 of the Montana Code, the application for a search warrant should "state facts sufficient to support probable cause"²¹³ as determined by a "neutral and detached" judge²¹⁴ before a judge issues a search warrant. Thus, the judge's first consideration should be what information supports the probable cause requirement. Often information provided by informants comes into question at this point for two reasons: (1) the evidence is hearsay,²¹⁵ or (2) criminal informants may have ulterior motives.²¹⁶

The traditional test employed to decide whether to consider information provided by informants derives from *Aguilar v. Texas*.²¹⁷ The *Aguilar* test requires that the issuing judge be satisfied with both the underlying basis for the informant's knowledge and the general veracity of that knowledge.²¹⁸ This latter prong might include consideration of the informant's credibility and the reasonableness of the applicant's reliance thereon.²¹⁹ In *Spinelli v. United States*,²²⁰ the Supreme Court, in interpreting the first prong of the *Aguilar* test, decided that basis of knowledge may be inferred if the information provided in the affidavit is sufficiently detailed.²²¹

The Supreme Court set forth the current totality of the circumstances test in *Illinois v. Gates*.²²² In *Gates* the Court held that a partially corroborated anonymous informant's letter describing in detail a drug deal failed to meet the *Aguilar-Spinelli* test but, in light of the totality of circumstances, probable cause ex-

213. MONT. CODE ANN. § 46-5-221 (1991) provides:

A judge shall issue a search warrant to a person upon application, in writing or by telephone, made under oath or affirmation, that:

- (1) states facts sufficient to support probable cause to believe that an offense has been committed;
- (2) states facts sufficient to support probable cause to believe that evidence, contraband, or persons connected with the offense may be found;
- (3) particularly describes the place, object, or persons to be searched; and
- (4) particularly describes who or what is to be seized.

214. *Johnson v. United States*, 333 U.S. 10, 14 (1948). See also *United States v. Leon*, 468 U.S. 897, 914 (1984); *Aguilar v. Texas*, 378 U.S. 108, 111 (1964) (stating that a judge is not neutral and detached if merely a "rubber stamp for the police").

215. *Aguilar*, 378 U.S. at 114.

216. See, e.g., *State v. Campbell*, 254 Mont. 425, 430-31, 838 P.2d 427, 430-31 (1992) (denying defendant's request to identify confidential informants based on his unsupported claim that his wife and daughter previously spurned the informants' sexual advances).

217. 378 U.S. 108.

218. *Id.* at 114.

219. See *id.*

220. 393 U.S. 410 (1969).

221. *Id.* at 416-17.

222. 462 U.S. 213, 230-31 (1983).

isted to issue the warrant nonetheless.²²³ In abandoning the *Aguilar-Spinelli* test, the Court in *Gates* characterized the determination of whether probable cause exists as difficult to define in technical terms and difficult to restrain within mechanical legal tests. Rather, the Court found probable cause centers on common sense and on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."²²⁴ Under the *Gates* test, a judge considering whether probable cause exists must balance "the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip,"²²⁵ including that information relevant under the technical test of *Aguilar-Spinelli*.²²⁶

In *Valley* the Montana Supreme Court found that the anonymous crimestopper tips lacked the necessary basis of knowledge, credibility, and independent corroboration to establish probable cause.²²⁷ While the district court appears to have applied the *Gates* test, the supreme court's application of that same test is, in reality, more akin to the technical *Aguilar-Spinelli* test. For example, the court applied the first prong of the *Aguilar-Spinelli* test in noting that the anonymous informant "gave no basis for his knowledge."²²⁸ Similarly, the court's application of the second prong of veracity becomes apparent when the court highlights that the anonymous informant failed to provide "such detail that the information became self-verifying or was able to be sufficiently corroborated."²²⁹

The Court in *Gates* abandoned the rigid *Aguilar-Spinelli* test for the "totality of the circumstances" test to allow "a deficiency in one [of the *Aguilar* prongs to] be compensated for by a strong showing as to the other."²³⁰ However, in *Valley* the Montana Supreme Court has interpreted the *Gates* test—which the United States Supreme Court said included the "'veracity' and 'basis of knowledge' of persons supplying hearsay information"—to mean that the *Aguilar-Spinelli* test is not really "abandoned," but a lesser-included test.²³¹ The Montana Supreme Court decision in

223. *Id.* at 245-46.

224. *Id.* at 231 (citing *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

225. *Id.* at 234.

226. *Id.* at 230.

227. *Valley*, 252 Mont. at 494, 830 P.2d at 1258.

228. *Id.* at 493, 830 P.2d at 1258.

229. *Id.* at 494, 830 P.2d at 1258.

230. 1 WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.3, at 193 (1984).

231. *Valley*, 252 Mont. at 492, 830 P.2d at 1257. The Court in *Gates* did not intend the *Aguilar-Spinelli* test to become a lesser-included test, as evidenced by the Court's own

Valley indicates that if the *Aguilar-Spinelli* test is not met, the totality of the circumstances test is not met, and the evidence should be suppressed.²³² The exception to this interpretation is found in *Rydberg*.²³³ But the facts presented in *Valley* appear no weaker than those presented in *Rydberg*, in which the supreme court also applied the *Gates* test.

In *Rydberg* an anonymous informant identified the defendant and two associates with previous drug records and claimed the defendant dealt in drugs. The informant's knowledge was based on personal observation, and her claims were similar to those of an earlier crimestopper tip.²³⁴ As the dissent points out, however, for all the issuing magistrate knew, the anonymous informant could have been the source of the crimestopper tip, as well.²³⁵ The majority in *Rydberg*, however, acknowledged that "[t]he application regrettably fail[ed] to state clearly the source of this information."²³⁶ Nonetheless, in *Rydberg* the majority gave great deference to the lower court and affirmed its decision that probable cause was established under the totality of the circumstances test.²³⁷

The court in *Valley* neglected to address important issues. First, the court failed to acknowledge Montana case law where the court clearly presumed citizen informants reliable.²³⁸ Rather, the court refers to an Iowa Supreme Court ruling that held that citizen informants were not presumed reliable.²³⁹ Second, aside from mentioning that the lower court relied on *Rydberg*,²⁴⁰ the court did not address its disparate holdings in *Rydberg* and *Valley*. A partial explanation may be that probable cause cases are fact specific. A

language:

[A]n informant's "veracity," "reliability," and "basis of knowledge" are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case [These elements] should be understood simply as closely intertwined issues that may usefully illuminate the common-sense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.

Gates, 462 U.S. at 230.

232. *Valley*, 252 Mont. at 494, 830 P.2d at 1258.

233. *Rydberg*, 239 Mont. at 72-73, 778 P.2d at 903-04.

234. *Id.* at 71-72, 778 P.2d at 902.

235. *Id.* at 77, 778 P.2d at 906 (Hunt, J., dissenting).

236. *Id.* at 73, 778 P.2d at 904.

237. *Id.* at 72-73, 778 P.2d at 903-04.

238. See *State v. Sharp*, 217 Mont. 40, 46, 702 P.2d 959, 962 (1985) (citing *State v. Kelly*, 205 Mont. 417, 436, 668 P.2d 1032, 1043 (1983), and *State v. Leistiko*, 176 Mont. 434, 439, 578 P.2d 1161, 1164 (1978)).

239. *Valley*, 252 Mont. at 493, 830 P.2d at 1258 (citing *Iowa v. Niehaus*, 452 N.W.2d 184, 189 (Iowa 1990)).

240. *Id.* at 492, 830 P.2d at 1257.

more probable explanation may be that *Rydberg* indicates the confusion and inherent subjectivity involved in applying the *Gates* test.

In *State v. Deskins* the dissent attacked the *Gates* test as subjective, "a step backward in the development of any set of coherent rules to deal with information supplied by an informant," and "an art form which is not based on any reason or rule of law."²⁴¹ Additionally, the dissent in *Deskins* stated that Montana should have rejected the *Gates* test because, in part, the right to privacy provision in Montana's Constitution mandates a higher standard before issuing a search warrant.²⁴²

In *Deskins* the majority applied the *Gates* test in holding that sufficient probable cause existed to support the issuance of a search warrant when an anonymous informant's reliability can be established by independent corroboration.²⁴³ The informant in *Deskins* stated that he personally observed a marijuana growing operation in the basement of a house located at 600 or 602 South Avenue East. The defendant did in fact own the property located at 600 and 602 South Avenue East, and the electrical power records indicated usage consistent with that required for a marijuana growing operation.²⁴⁴

The dissent in *Deskins* advocated a "renewed adherence to the two-pronged *Aguilar-Spinelli* test."²⁴⁵ The dissent stressed, "however, that the two prongs of *Aguilar-Spinelli* need only be met when the police are relying upon evidence obtained through an informant."²⁴⁶ Also, in *Deskins* the dissent forewarns the court not to attach any presumptions to information obtained through anonymous informants without first establishing the informant's reliability.²⁴⁷ The dissent argued that the police officers in *Deskins* failed this second prong of the *Aguilar-Spinelli* test based on the innocent fact that the defendant in fact owned the property at the addresses given and the unsupported electrical records.²⁴⁸

The dissent in *Deskins* suggested that Montana reject completely the *Gates* test.²⁴⁹ Montana has in fact adopted the *Gates*

241. *State v. Deskins*, 245 Mont. 158, 165-66, 799 P.2d 1070, 1074-75 (1990).

242. *Id.* at 170-71, 799 P.2d at 1077-78.

243. *Id.* at 162-63, 799 P.2d at 1072-73.

244. *Id.* at 159-60, 799 P.2d at 1071.

245. *Id.* at 166, 799 P.2d at 1075.

246. *Id.*

247. *Id.* at 167, 799 P.2d at 1075-76.

248. *Id.* at 169, 799 P.2d at 1077.

249. *Id.* at 170-71, 799 P.2d at 1077-78.

test, however.²⁵⁰ Nonetheless, it is unclear from *Valley* whether Montana adheres to the *Gates* test or has retained its predecessor, the *Aguilar-Spinelli* test. On the other hand, it is arguable that two standards exist for reviewing probable cause determinations in Montana: the *Gates* test and the test enumerated by the dissent in *Deskins* (*Aguilar-Spinelli* test as applied under the guise of *Gates*). Until definitively addressed by the court, the confusion regarding the standard for determination of probable cause will continue in Montana.

VII. EVIDENCE

State v. Christenson: Videotape Use: Admission into Evidence and into the Jury Room

In *State v. Christenson*²⁵¹ the Montana Supreme Court considered whether the district court committed reversible error, initially by admitting a videotape of the crime scene into evidence and later by permitting the jury to view the videotape during deliberations.²⁵² The supreme court held that the district court did not abuse its discretion in admitting the videotape into evidence.²⁵³ Likewise, the supreme court found permitting the videotape to go to the jury room did not prejudice the defendant.²⁵⁴

The case against the defendant began when he answered a knock at his door on September 5, 1989, and discovered law enforcement officers with a search warrant. Shortly after finding sufficient evidence of a crime,²⁵⁵ the officers escorted the defendant and his roommate to jail. The remaining officers, including Detective Jacobs, then continued their search while documenting on videotape the items found and their location.²⁵⁶

At trial the defendant's attorney stipulated to admitting the videotape into evidence if played without sound.²⁵⁷ The jury convicted the defendant of criminal possession of cocaine, a lesser-included offense of criminal possession of methamphetamine, and criminal possession of dangerous drug paraphernalia.²⁵⁸ The defendant appealed, claiming: (1) the videotape lacked the requisite

250. *Id.* at 163, 799 P.2d at 1073 (citing *Kelley*, 205 Mont. at 440, 668 P.2d at 1045).

251. 250 Mont. 351, 820 P.2d 1303 (1991).

252. *Id.* at 353, 820 P.2d at 1305.

253. *Id.* at 361, 820 P.2d at 1310.

254. *Id.*

255. *Id.* at 359, 820 P.2d at 1308.

256. *Id.* at 353-54, 820 P.2d at 1305.

257. *Id.* at 354, 820 P.2d at 1305.

258. *Id.* at 354, 820 P.2d at 1306.

authentication for admission into evidence because "the videotape did not fully show the premises prior to, during, and after the search," (2) the videotape prejudiced him as evidenced by the jury's viewing the videotape during deliberations, and (3) viewing the videotape during deliberations allowed the jury "to give undue weight to this testimonial evidence."²⁵⁹

Currently, the only Montana statute or rule of evidence that specifically sets forth a framework for admitting videotaped evidence at trial relates to testimony of sex crime victims.²⁶⁰ Videotapes do, however, fall within the definition of photographs.²⁶¹ Additionally, videotapes must meet both the relevancy standard²⁶² and the authentication or identification requirement²⁶³ to be admitted into evidence.

On appeal the defendant did not challenge the relevancy of the videotape, only its authenticity.²⁶⁴ Under Montana law, authentication requires that evidence be "sufficient to support a finding that the matter in question is what its proponent claims."²⁶⁵ In the instant case, the supreme court held that Detective Jacobs' testimony concerning the videotaping process provided the necessary foundation for its authentication and admission.²⁶⁶ Since the videotape's proponent, the State, made no claims other than that the videotape documented "the search results after the initial discovery of what was purported to be evidence of crime," the videotape did not have to conform to any particular sequence or format.²⁶⁷ The adequacy of foundation for the admission of evidence is largely within the trial judge's discretion.²⁶⁸ According to the supreme court, whether the videotape fully documented the premises

259. *Id.* at 358-60, 820 P.2d at 1308-09.

260. MONT. CODE ANN. § 46-16-216 (1991) states in part:

[T]he testimony of the victim, at the request of the victim and with the concurrence of the prosecutor, may be recorded by means of videotape for presentation at trial. The recorded testimony may be presented at trial and must be received into evidence. The victim need not be physically present in the courtroom when the videotape is admitted into evidence.

261. "Photographs include still photographs, x-ray films, video tapes, and motion pictures." MONT. R. EVID. 1001(2).

262. MONT. R. EVID. 401.

263. MONT. R. EVID. 901.

264. *Christenson*, 250 Mont. at 358-59, 820 P.2d at 1308.

265. MONT. R. EVID. 901(a). *See also* *Pickett v. Kyger*, 151 Mont. 87, 97, 439 P.2d 57, 62 (1968) (holding that proper foundation for a photograph requires the authenticating witness to testify that it accurately represents the scene and to point out any changes).

266. *Christenson*, 250 Mont. at 358-59, 820 P.2d at 1308-09.

267. *Id.* at 359, 820 P.2d at 1308-09.

268. *Id.* at 359, 820 P.2d at 1308 (citing *State v. Armstrong*, 189 Mont. 407, 432, 616 P.2d 341, 355 (1980)).

before, during, or after the search does not affect its admissibility as alleged by the defendant, but rather falls within the jury's exclusive province to accord weight to the evidence presented.²⁶⁹

The defendant also argued that the lower court should have excluded the videotape because it was unduly prejudicial.²⁷⁰ The supreme court disagreed and found that playing the videotape without sound minimized any possible prejudicial effect the videotape might have had on the jury. Additionally, the court determined that the videotape's probative value—corroborating and illustrating Detective Jacobs' testimony—substantially outweighed any undue prejudice to the defendant.²⁷¹

Finally, the defendant contended that the jury's review of the videotape during deliberations prejudiced him in that it emphasized certain testimonial evidence.²⁷² In Montana the jury may take with it into deliberations all papers admitted into evidence and any exhibits deemed necessary by the court.²⁷³ The jury may not, however, deliberate with depositions or papers the court refuses to request from the possessors.²⁷⁴ In support of his contention, the defendant relied on *Colorado v. Montoya*, where the Colorado Court of Appeals analogized a witness's videotaped statement given to police to a deposition.²⁷⁵ The appellate court found that unrestricted and unsupervised jury viewing of the videotape constituted prejudicial error to the defendant.²⁷⁶ The Montana Supreme Court, however, distinguished *Montoya* on the fact that the silent videotape in the instant case contained no deposition-like testimony or statements but, rather, was analogous to a series of

269. *Id.* at 359, 820 P.2d at 1309 (citing *State v. Laverdure*, 241 Mont. 135, 138, 785 P.2d 718, 720 (1990)).

270. *Id.* at 360, 820 P.2d at 1309. See generally MONT. R. EVID. 403 which states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

271. *Christenson*, 250 Mont. at 360, 820 P.2d at 1309-10.

272. *Id.* at 360, 820 P.2d at 1309.

273. See MONT. CODE ANN. § 46-16-504 (1991) which states: "Upon retiring for deliberation, the jurors may take with them the written jury instructions read by the court, notes of the proceedings taken by themselves, and all exhibits that have been received as evidence in the cause that in the opinion of the court will be necessary." See also *State v. Thompson*, 164 Mont. 415, 423-25, 524 P.2d 1115, 1119-20 (1974); *State v. Cates*, 97 Mont. 173, 197-98, 33 P.2d 578, 585 (1934); *Territory v. Doyle*, 7 Mont. 245, 249, 14 P. 671, 672 (1887).

274. *Christenson*, 250 Mont. at 360, 820 P.2d at 1309 (quoting MONT. CODE ANN. § 46-16-504 (1989)). That statute has since been amended and now states, "all exhibits that have been received as evidence in the cause that in the opinion of the court will be necessary." MONT. CODE ANN. § 46-16-504 (1991).

275. 773 P.2d 623, 626 (Colo. Ct. App. 1989).

276. *Id.*

still photographs.²⁷⁷ If the court had determined the videotape were more like a deposition, it is unlikely the videotape would have been permitted in the jury room. Nonetheless, the court adhered to the federal and state classifications of videotapes within the definition of photographs²⁷⁸ and allowed the videotape into evidence.²⁷⁹

The court, in support of its extension of Montana law, referred to *State v. Morse*²⁸⁰ where it found no error in allowing audiotapes properly admitted into evidence to go to the jury room.²⁸¹ Noteworthy, however, is the fact that the audiotapes considered in that case were crucial surveillance tapes of poor quality.²⁸² Additionally, the trial court in *Morse* instructed the jury as to the weight to be accorded to the audiotapes—to disregard entirely the interpretive testimony if difficult to understand or otherwise inaudible.²⁸³

Following the court's reasoning in *Christenson*, the critical distinction in evaluating videotape evidence apparently lies in its characterization of whether the videotape: (1) recorded relevant facts as they occurred, (2) portrayed the scene of the litigated event, or (3) presented a litigant's theory of the case. If the videotape records facts as they occur, as in *Christenson*, or portrays the scene of the litigated event, as the photographs in *State v. Medicine Bull*,²⁸⁴ the videotape probably will be allowed into the jury room. In contrast, if the videotape presents a litigant's theory, as the movie in *Brown v. North American Manufacturing Co.*,²⁸⁵ or presents witness testimony, as the drawing in *Carman v. Montana Central Railway Co.*,²⁸⁶ then the videotape should not go to the jury room.

Given the popularity of videotape recorders, the increasing availability of videotape evidence, the growing number of law enforcement officers carrying videotape recorders, and the court's decision in *Christenson*, videotapes will appear increasingly both in the courtroom and in the jury room. Of course, nothing speeds up the admission of videotapes into evidence like stipulating to their

277. *Christenson*, 250 Mont. at 361, 820 P.2d at 1309-10. See also *State v. Medicine Bull*, 152 Mont. 34, 43, 445 P.2d 916, 921-22 (1968) (classifying photographs as "papers" entitled to go to the jury room).

278. FED. R. EVID. 1001(2); MONT. R. EVID. 1001(2).

279. *Christenson*, 250 Mont. at 361, 820 P.2d at 1310.

280. 229 Mont. 222, 746 P.2d 108 (1987).

281. *Id.* at 233, 746 P.2d at 115.

282. *Id.* at 226, 746 P.2d at 110.

283. *Id.* at 232, 746 P.2d at 114.

284. 152 Mont. at 44, 445 P.2d at 922.

285. 176 Mont. 98, 116-17, 576 P.2d 711, 722 (1978).

286. 32 Mont. 137, 141, 79 P. 690, 692 (1905).

admission at trial, as the defense attorney did in *Christenson*.²⁸⁷ A trial attorney, whether civil or criminal, who does not want a videotape in evidence should strenuously object to any attempt to admit a videotape into evidence and to any request or decision that it go to the jury room. Accordingly, attorneys should educate themselves on the prejudicial nature associated with videotape evidence, such as "deliberate editorial manipulation, subtle, . . . possibly unintentional bias, . . . [and] the 'familiar power' of television."²⁸⁸ The effect of *Christenson* is limited, at least for now, because videotapes remain subject to the same restraints as photographs.²⁸⁹

287. *Christenson*, 250 Mont. at 354, 820 P.2d at 1305.

288. Sharon Panian, Comment, *Truth, Lies and Videotape: Are Current Federal Rules of Evidence Adequate?*, 21 Sw. U. L. REV. 1199, 1214 (1992).

289. See *supra* notes 261-63 and accompanying text.